

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

The State of Missouri

AT THE

OCTOBER TERM, 1878.

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SEEK, *Appellant*, v. HAYNES.

**Widow's Homestead:** DOWER; WAIVER; ESTOPPEL; PROCEDURE. A widow entitled to both homestead and dower in land of her deceased husband, caused her dower to be assigned, and accepted the assignment, but, being ignorant of her right to a homestead, did not then claim it. Being administratrix of her husband's estate, she also procured from the probate court an order for the sale of all the lands of the estate, but no sale was ever made. In a proceeding subsequently instituted by her to have her homestead set out, *Held*, that her acts did not constitute either a waiver or an estoppel so as to prevent her from asserting her right; *Held, further*, that under section 6, page 698, Wag. Stat., the proper procedure was to have the homestead first set out, and then if its value were less than



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one-third of the real estate of her husband, dower should also be assigned; but this course should only be taken upon the terms that the widow execute a suitable relinquishment of the rights already acquired under the former assignment.

*Appeal from Ray Circuit Court.*—HON. GEO. W. DUNN,  
Judge.

*Farris & Conrow* for appellant, cited *Gragg v. Gragg*, 65 Mo. 343; *Doane v. Doane*, 33 Vt. 650.

*C. T. Garner & Son* for respondent.

It is insisted that the proceedings in the probate court by the appellant for the sale of the land, instituted by her, was an adjudication in law, and the final order so made as aforesaid was in the nature and had the force and effect of a judgment. It was in a court having competent jurisdiction with all the parties interested and all the facts and subject matter before it. It was final—predicated upon the law and the facts, possessing all the features of a judgment or decree—passes title to the purchaser, and is legally conclusive and binding upon the appellant, the creditors and heirs of the estate, and now precludes the appellant from asserting her homestead right. It is insisted that when the appellant brought her suit for dower, it was her duty, and she was bound to assert all the claim she might have in the land, and failing to make any claim for homestead, and afterwards by legal proceedings in a court of competent jurisdiction, having said land adjudged and ordered to be sold, constitutes in law a waiver of any homestead rights in the land, was a relinquishment of such right, and precludes her from now claiming a homestead right. In the case of *Gragg v. Gragg* the assertion of the homestead right was only against the children and heirs. In the case at bar, creditors intervene who are interested. In the *Gragg* case the widow bore no special relation to the estate, and there were none of the elements of legal waiver or estoppel. In the case at bar the appellant, who is the

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widow, sustained such a relation to the estate as made all the proceedings binding upon her, and admissions of record against her—the elements of waiver and estoppel exist in the case at bar. In the Gragg case the widow had done nothing to mislead or deceive the heirs, nor did her claim abridge their rights. In the case at bar the appellant has deceived and misled the creditors, imposing upon the estate the expense of assigning dower, and afterwards having the residue of the land ordered and adjudged to be sold for the benefit of creditors to pay their debts, and then afterwards setting up a claim of homestead to defeat the very proceedings instituted, and deprive the creditors of the estate.

SHERWOOD, C. J.—Plaintiff instituted this proceeding in the Ray probate court to have a homestead set out to her and her two minor children. On the cause being appealed by her to the circuit court, it was submitted upon the following agreed statement: *First*, That John K Seek departed this life, intestate, on the 18th day of May, 1873, seized and possessed of an indefeasible estate, in fee simple, in and to about 195 acres of land in Ray county, State of Missouri, leaving Mary Seek, appellant herein, as his widow, and also two minor children, and at the time of the death of the said Seek, and for a long time prior thereto, he and Mary Seek, his wife, resided upon the land aforesaid. *Second*, That during the lifetime of the said John K. Seek, he owed no debts that constituted a legal charge upon his lands. *Third*, That the title to the lands of which the said Seek died seized and possessed, has in no particular been changed since his demise. *Fourth*, That if Mary Seek and her two minor children are deemed entitled to homestead in the land of which John K. Seek died seized and possessed, it is necessary that the same should be set off by metes and bounds. *Fifth*, That upon the death of the said John K. Seek, Mary Seek, his widow, administered upon the estate of her deceased husband; that, as administratrix, she applied to the probate court for an order to

sell all or so much of deceased's land as would be sufficient to pay his debts, and that the order was so made, but no sale was ever had under said order, that the sale of the land has been postponed to await decision in this suit. *Sixth*, That in 1875, Jas. P. Haynes, public administrator, and appellee herein, took charge of the estate of John K. Seek, deceased, whereby Mary Seek was discharged as administratrix; that in 1876 the said Mary Seek, as the widow of John K. Seek, had dower admeasured to her, which she now occupies. *Seventh*, That Mary Seek makes oath that at the time she applied for and had dower admeasured to her out of her deceased husband's land, she had no knowledge of the fact that she was also entitled to a homestead therein.

Upon the above agreed statement of facts the following declarations of law were asked for by plaintiff and refused by the court—no declarations being asked by defendant. *First*, That upon the death of John K. Seek, husband of the plaintiff, Mary Seek, she became vested of an estate in fee simple in and to a homestead in the land of which her husband died seized and possessed, not exceeding the value of fifteen hundred dollars, nor in quantity 160 acres. *Second*, That the application by plaintiff in the probate court, while acting as administratrix of the estate of her deceased husband, for an order to sell the land of which her husband died seized, to pay the debts of deceased, with subsequent application for an admeasurement of dower to plaintiff, constitute neither waiver nor estoppel as to her right to a homestead. *Third*, Although plaintiff procured an order of probate for the sale of the land belonging to the estate of her husband, and had dower assigned her in the same, if such acts were done at the time in ignorance of the fact of her right to homestead in the land, she is not thereby estopped, and can yet have the benefit of such right.

The statute regarding homesteads (Wag. Stat., sec. 6, p. 698), provides that, "The commissioners appointed to

set out such homestead shall, in cases in which a right of dower shall also exist, also set out such dower; and they shall first set out such homestead and from the residue of the real estate of the deceased, shall set out such dower; but the amount of such dower shall be diminished by the amount of the interest of such widow in such homestead; and if the interest of such widow in such homestead shall equal or exceed one-third of all the real estate of which such housekeeper or head of a family shall have died seized, no dower shall be assigned to such widow." It does not appear from the agreed statement, whether the dower assigned equaled or exceeded in value one-third of the real estate whereof the decedent died seized; and in this respect the statement is deficient. It is evident, however, from the refusal of plaintiff's declaration of law, that the trial court regarded the plaintiff, under the circumstances, as estopped to claim, or else had waived her homestead right.

Neither theory was correct. She could not waive that of which she was ignorant, nor could she be estopped where her course of conduct had led no one to change his condition to his prejudice. If the contemplated sale of the real estate had taken place, and a creditor had bought the land, perhaps a different question would be presented; one not necessary to be now considered. But here, so far as the sale of the land is concerned, everything remains *in fieri*. The *status* of the widow and of the creditors remains the same as if no order of sale had been made. It is true that dower has been assigned to the widow in the land of the decedent instead of having her homestead first set out in accordance with the statutory order; but this constitutes no serious obstacle to the adjustment of the homestead right of herself and children. *Gragg v. Gragg*, 65 Mo. 343. By virtue of section 5 of the same chapter, the homestead vested in plaintiff and her minor children. As a matter of course, under the provisions of section 6 *supra*, if she received a homestead equaling or exceeding in value

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one-third of the real estate of her deceased husband, she can have no dower; and that dower if the homestead, when set out, do not equal or exceed one-third of the value of the real estate will be diminished in proportion to the increased value of the homestead, and *vice versa*. On return of this cause to the circuit court, that court will take action in conformity herewith; will cause the homestead applied for to be first set out, and then if the value of the homestead be not too great, will assign to the widow her dower. This course, however, is only to be taken upon the terms that the widow execute a suitable relinquishment of the rights already acquired under the former assignment of dower. Judgment reversed and cause remanded. All concur.

REVERSED.

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TURK, *Appellant*, v. FUNK.

**Priority of Mortgage for Purchase Money.** A mortgage given to a vendor to secure an unpaid balance of purchase money of land and recorded on the same day, has priority of one which is given by the vendee, before he has concluded the purchase, to a person who furnishes him the money to make the cash payment, notwithstanding the latter is recorded first.

*Appeal from Jasper Court of Common Pleas.*—This case was tried before B. F. GARRISON, Esq., Temporary Judge.

Suit to foreclose a mortgage given by defendant, Funk, to secure an unpaid balance of purchase money due plaintiff. Defendant Meyers, held another mortgage on the same land which he claimed was entitled to priority. The facts are fully stated in the opinion.

*Henry Flanagan* with whom was *Henry Brumback* for appellant.

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1. A deed and purchase-money mortgage given at the same time must be construed together as one contract. Myers took the interest conveyed to him by Funk, subject to any prior equity attached to the premises conveyed. Even though Myers' mortgage had been executed and recorded first, the priority of Turk's could not be affected, for until Turk conveyed to Funk, he had no interest in the land upon which a conveyance could operate. When a vendor of real estate conveys, he has no occasion to examine the records or to inquire about incumbrances created prior to his conveyance. He has the power to protect himself by a qualified or conditional transfer, or by any legal mode of creating a lien, to secure himself for unpaid purchase money. When he conveys and instantly takes a reconveyance as such security no authority is needed to demonstrate the gross injustice of permitting a prior mortgage from intervening to his prejudice. *Morris v. Pate*, 31 Mo. 315; *Dusenbury v. Hulbert*, 59 N. Y. 541. In case at bar both mortgages were recorded at the same time, but Turk's attached to and became a lien upon the whole estate, while Myers' only to the interest which Funk had, which was subject to Turk's mortgage. *Bolles v. Carli*, 12 Minn. 113; *Cake's appeal*, 23 Pa. St. 186; *Van Rensselaer v. Stafford*, Hopk. Ch. 569; *Johnson v. Slawson*, 1 Bailey Eq. 463. 2. It was not the duty of plaintiff to disclose his lien on the land sold, unless interrogated in regard thereto. Meyers knew the plaintiff was the owner and in possession of the land, and if he closed his eyes to facts which he was bound to know, he, and not the plaintiff, must suffer. *Dyer v. Martin*, 4 Scam. (Ill.) 146; *Rice v. Dewey*, 54 Barb. 455; *Dusenbury v. Hulbert*, 59 N. Y. 541.

*Harding & Buler* for respondents.

NAPTON, J.—The only question in this case is that of priority between two mortgages recorded on the same day,



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one executed by the vendee of a tract of land to the vendor to secure the payment of part of the purchase money, and the other made by the vendee to the person from whom he borrowed that part of the purchase money required to be paid on the consummation of the trade.

The undisputed facts in this case are very simple. Turk, the plaintiff, agreed to sell Funk, one of the defendants, two pieces of land, one of 100 acres for \$1,200, and the other of 20 acres for \$1,000. \$500 were to be paid by Funk on the first tract, and two notes given for \$350 each, payable in one and two years. On the other no money was to be paid down, but two notes were to be given for \$500 each, payable in one and two years. The deeds were not to be delivered to Funk until the payment of the \$500 and the execution of two mortgages to Turk, including each tract, to secure the payment of the \$1,700 due on the contract. The negotiation was conducted by Starr, an agent of Turk, with Funk, some weeks before it was concluded by an interchange of deeds, and, according to the testimony of Funk, the particulars of the trade were communicated by Funk, the vendee, to Meyers, the defendant, from whom Funk expected to get the \$500 in order to secure the land. This statement of Funk is, however, contradicted by Meyers, and we will assume it to be false, although its probability is quite obvious. It is certain that on the 2nd day of July, Funk and Starr went to the banking house of Meyers to complete the trade; that the \$500 was borrowed of Meyers by Funk, and handed over to Starr along with the two mortgages to secure the purchase money unpaid, and at the same time Starr handed over the deeds of Turk. Which was done first, the two witnesses, who state the occurrence, do not profess to recollect exactly, but it was all done, as they say, about the same time. Both the witnesses agree, however, that when this was done, both Starr and Funk went directly to the recorder's office and filed their deeds about 11 o'clock a. m. of that day. Meyers' mortgage for the \$500 he lent to Funk was

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then on record. The following is a copy of Meyers' testimony on this point, taken from the record, and is all that is preserved in the record: "I did not agree with Turk to take a second mortgage; I knew nothing about a mortgage to Turk or unpaid purchase money of the land. I paid out the money, got my mortgage and immediately had it recorded; saw the deed delivered after I got my mortgage."

The law applicable to the facts of this case, so far as they can be gathered from the record, seems very plain. According to the statement of Meyers himself, his mortgage was procured from Funk before the title from Turk to him had passed. Indeed, unless both Funk and Starr testified falsely, the mortgage to Meyers must have been made and delivered first, as they both state that as soon as the \$500 was paid and the deeds exchanged, they both went straight to the recorder's office, and there is no dispute that Meyers' mortgage was then recorded. It is unnecessary to add that upon these facts Meyers' mortgage could convey only Funk's then interest, which was a right to a deed when the purchase money was secured. In other words, it was subject to the mortgage of Turk.

We have been unable to find any evidence whatever of any fraud practiced by Starr, the vendor's agent, by which Meyers could be misled. Meyers merely states, in general terms, that he knew of no unpaid purchase money or mortgages to Turk. He does not say that Starr informed him that there were none, or that Starr did anything or said anything calculated to lead him to such a conclusion. He does not say that he inquired of any one, Starr or any one else, on the subject, much less does he say that Starr misled him. He evidently never saw the deed from Turk to Funk (indeed it is not in the record) until after Funk's mortgage to him was executed and recorded, for it was never delivered to Funk until after Meyers got his mortgage, nor does he in his evidence so state or even insinuate. He merely makes a general denial of knowledge



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concerning unpaid purchase money and mortgages. It was his business to have informed himself about this—it was certainly not Turk's duty to tell him. Turk, or his agent, Starr, had a right to suppose that Meyers was competent to attend to his own interest and lend his money on such terms as suited him.

The judgment of the common pleas court is reversed and the cause remanded, with directions that the common pleas court enter a decree in conformity to this opinion, giving the vendor's mortgage priority. The other judges concur, except Judge NORTON.

REVERSED.

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THE STATE V. WILLIAM GRATE, *Plaintiff in Error.*

1. **Return of Indictment into Court.** The failure of the record to show in express terms that the indictment was returned into open court by the grand jury, will not warrant the reversal of a judgment of conviction upon an indictment for murder. An endorsement upon the indictment as follows: "A true bill, H. A. S., foreman. Filed October 7th, 1875. D. N. L., Clerk," is sufficient evidence that the indictment was duly found and returned.
2. **Absence of Prisoner during trial.** The fact that the prosecuting attorney began his closing argument to the jury while the defendant was temporarily absent from the court room, will not warrant the reversal of a judgment of conviction in the absence of evidence that the defendant was prejudiced thereby, or that any substantial portion of the argument was made before his return.
3. **A plea of not guilty** waives the necessity of a formal arraignment.
4. **Evidence of Reputation.** A witness who is well acquainted with a person whose character is in question, and lives in his neighborhood, will be allowed to testify to his general reputation although he may never have heard it discussed or questioned. Frequently the highest evidence which can be offered of character is of this negative kind.
5. **Rejection of such Evidence:** GROUND FOR REVERSAL, WHEN. Where the court rejects the testimony of two witnesses as to character, but afterwards admits the testimony of two others on the *same point*, it is ground for reversal. SHERWOOD, C. J., dissenting on last point.

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*Error to Clark Circuit Court.*—HON. JOHN C. ANDERSON,  
Judge.

*Frank Hagerman and James Hagerman* for plaintiff in error.

1. The failure of the record to show a presentment of the indictment in open court by the grand jury is a fatal defect. Constitution of Missouri (1865), art. 1, § 24; Wag. Stat., § 21, p. 1084; § 1, p. 1086; *Gardner v. People*, 20 Ill. 433; *Rainey v. People*, 3 Gil. (Ill.) 72; *Brown v. State*, 7 Humph. (Tenn.) 155; *Chappel v. State*, 8 Yerg. (Tenn.) 170; *Hite v. State*, 9 Yerg. 198; *Commonwealth v. Cawood*, 2 Va. cases 527; *Green v. State*, 19 Ark. 178; *Cachute v. State*, 50 Miss. 165; *Laura v. State*, 26 Miss. 176; *Friar v. State*, 3 How. 423; *Goodwyn v. State*, 4 Smed. & Mar. 535; *Jenkins v. State*, 30 Miss. 408; *Pond v. State*, 47 Miss. 39; *State v. Coz*, 6 Iredell, 440; *State v. Glover*, 3 Greene (Iowa) 249; *Adams v. State*, 11 Ind. 304; *Jackson v. State*, 21 Ind. 79; *Hall v. State*, 21 Ind. 268; *Conner v. State*, 18 Ind. 429; 19 Ind. 98; *Springer v. State*, 19 Ind. 180; *The State v. Carson*, 12 Mo. 407; *The State v. Mertens*, 14 Mo. 94; *The State v. Clark*, 18 Mo. 432; *The State v. Freeman*, 21 Mo. 481; *The State v. Burgess*, 24 Mo. 382. 2. The absence of the accused from the court during a portion of the trial must reverse the cause. *The State v. Matthews*, 20 Mo. 55; *The State v. Buckner*, 25 Mo. 168; *The State v. Cross*, 27 Mo. 332; *The State v. Schoenwald*, 31 Mo. 147; *The State v. Braunschweig*, 36 Mo. 397; *The State v. Ott*, 49 Mo. 326; *The State v. Barnes*, 59 Mo. 154; *The State v. Jones*, 61 Mo. 232; *The State v. Barnett*, 63 Mo. 300; *The State v. Cheek*, 63 Mo. 364; *The State v. Allen*, 64 Mo. 67; *The State v. Dooly*, 64 Mo. 146; *Meredeth v. People*, 84 Ill. 480; *Maurer v. People*, 43 N. Y. 3; *Brownlee v. Hewitt*, 1 Mo. App. 367. 3. There was no arraignment. The record must show arraignment, as well as plea. *The State v. Matthews*, 20 Mo. 55; *The State v. Saunders*, 53 Mo. 234; *The State v. Mont-*

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gomery, 63 Mo. 296; 2 Wag. Stat., 1095, §§ 2, 4, 5; 1 Bishop Crim. Proced., (2 Ed.) §§ 728, 733; *State v. Lartigue*, 6 La. Ann. 404; *State v. Price*, Ib. 691. 4. Upon the question of character the defendant should have been permitted to prove by his neighbors that his moral character or reputation as a peaceable citizen had never been questioned prior to the difficulty.

*J. L. Smith*, Attorney-General, for the State.

1. When the indictment is indorsed properly and comes into the hands of the clerk, the demands of the statute are satisfied. *The State v. Clark*, 18 Mo. 432; *The State v. Couperhaven*, 39 Mo. 430. 2. Greenleaf lays down the rule that "the examination must be confined to his general reputation. \* \* \* The inquiry must be made as to his general reputation where he is best known. It is not enough that the impeaching witness professes merely to state what he has heard, 'others say.' He must be able to state what is generally said of the person, by those among whom he dwells, or with whom he is chiefly conversant, 'for it is this only that constitutes his general reputation or character.'" Greenl. on Ev. § 461; *State v. White*, 35 Mo. 500; *Warlick v. Peterson*, 58 Mo. 408. 3. The section of our statute requiring a defendant to be present in person was enacted in order to give full force and effect to the constitutional provision, "that the accused shall meet the witnesses against him face to face," and to give him an opportunity of polling the jury when they return their verdict. It was never intended that merely because the defendant stepped out of the room, and during his absence the prosecuting attorney made a portion of his argument, he should, after a verdict of guilty, be granted a new trial. *The State v. Brown*, 63 Mo. 439.

SHERWOOD, C. J.—Defendant, indicted for murder in the first degree, was, upon trial had, convicted of manslaughter in the second degree, and comes here alleging

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divers errors. Owing to the conclusion we have reached, after a careful examination of the record, we have deemed it unnecessary to give expression to our views in detail respecting many of those errors, since in the view a majority of the court have taken, the cause must be retried, and since, also, we regard the trial of the defendant as having been, for the most part, very fairly conducted, and the law, in the main, correctly administered. In one particular, however, to which we will presently advert, my associates think prejudicial error was committed.

I. As to the preliminary objection urged against the indictment that it only bore the indorsement "A true bill, H. A. Stewart, foreman. Filed October 7th, 1875, D. N. Lapsley, clerk." We have this to say: That a similar objection was decided adversely to the objector in *The State v. Pitts*, 58 Mo. 556. It would be strange indeed if the indictment should be rendered invalid by the failure of the clerk to make an entry respecting the presentation of the indictment by the grand jury in open court when the statute, 2 Wag. Stat., sec. 1, p. 1086, expressly forbids the clerk, where a felony is charged, from making any entry on the minutes or records of the court in reference to the indictment, unless the defendant is in custody or on recognizance. The fact that defendant was under bail in the same court, charged by indictment for the same offense, with murder in the second degree, does not alter or vary the statutory inhibition because the indictment under which defendant was tried charged Matthew Grate also with the murder, and it does not appear that he was either on bail or in custody.

The statute, 2 Wag. Stat., sec. 21, p. 1084, provides that, "indictments found and presentments made by a grand jury shall be presented by their foreman, in their presence, to the court, and shall be there filed and remain as records of such court." It is out of the power of the clerk, by his remissness, to balk the action of the grand jury. The indictment became a record of the court when returned by

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the grand jury in accordance with the statutory provision above noted. This was so ruled in *The State v. Clarke*, 18 Mo. 432. In that case only the usual indorsement was made on the indictment by the foreman of the grand jury, but it was held that the indictment on its presentation by the grand jury became *ipso facto* a record of the court, and that the court should have ordered the clerk to indorse the time it was filed *nunc pro tunc*. There was no such difficulty to be obviated in the case at bar, because the clerk had indorsed upon the bill that it was "filed," and this, in connection with the indorsement by the foreman, showed that it had been "returned" by the grand jury in open court. *The State v. Clarke, supra*. In *Baker v. Henry*, 63 Mo. 517, in respect to the report of an administratrix, it was remarked: "The mere indorsement by the clerk, on the paper, is not the sole constituent element of filing that paper; for in legal contemplation the presentation and delivery of the paper to the court or officer, is the filing which dates from its receipt by the clerk and lodgment in his office, although the clerk's indorsement is the highest legal evidence of the filing, and that indorsement being merely ministerial, is amendable at common law." In that ruling we followed the authority of *State v. Gowen*, 7 Eng. (Ark.) 62, in regard to an indictment which the clerk had failed to indorse, "filed." We have been thus particular respecting the point under discussion, because that point is brought to our attention again and again, at almost every term of the court. There was no error on this point committed by the court below.

II. Nor do we think the court erred in regard to the matter of the absence of the defendant during a portion of the argument on the part of the prosecution.

2. ABSENCE OF PRISONER DURING TRIAL. The record shows the presence of the defendant throughout the trial and at the rendition of the verdict. Whether it would be permissible to contradict these record recitals by affidavits and show thereby, as was attempted, that defendant was absent for a brief period dur-

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ing the conclusion of the argument on behalf of the State, need not be discussed, as it does not appear that defendant's absence was more than momentary, and by defendant's own affidavit it is only shown that the prosecuting attorney "had begun his final argument to the jury" when the defendant returned. In the absence of anything in the affidavits to the contrary, we shall not assume that defendant was prejudiced, or that any substantial portion of the concluding argument was made before defendant's return after recess. He who alleges error must prove it.

III. Although there was no formal arraignment of the defendant, yet the record shows that he pleaded not guilty to the indictment, and this answers the objection on that score. *The State v. Braunschweig*, 36 Mo. 377; *The State v. Saunders*, 53 Mo. 234.

IV. We come now to the point which my associates think must accomplish the reversal of the judgment. It is this: Testimony as to general moral character and general reputation of defendant as a moral man and peaceable, law-abiding citizen in the neighborhood in which he lived, was excluded, because the witnesses who had known the defendant for years were only able to state, as a reason for answering, that his reputation in those respects was good, that they had never heard it discussed or questioned. While it is true that the usual formula as to such matters is to inquire if the witness knows the general reputation of the person in question, and what that reputation is, 1 Greenl. Ev. 461; yet the hackneyed and stereotyped mode of answering such inquiry need not always be pursued. Frequently the highest evidence which can be offered in this regard is of that negative character which the court below unwarrantably, as we think, excluded. That reputation may with justice well be called good which no slanderer has ever ventured to even so much as question. A blameless life, oftentimes, though not always, gives origin to such a reputation. But when it can be said of a man by those well acquainted

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with him, that they never heard his reputation, as to truth and morals, discussed, denied or doubted, it is equivalent to passing upon him the highest encomium. The authorities abundantly establish that the person testifying need not base his means of knowledge on what is "generally said" of the person whose character is in question, but may base his knowledge of the reputation of such person on evidence of the negative nature above noted. *Lemons v. State*, 4 W. Va. 755; *Gandolfo v. State*, 11 Ohio St. 114; C. J. Cockburn, in Rowten's case, L. & C. C. C. vol. 1, 536; Kelley's Crim. Law, § 241.

V. My individual opinion of the point under discussion is, that although error was committed by the court in excluding the testimony referred to, yet that such error may be said to have been neutralized by the testimony of two witnesses, Hill and Grate, which was received without objection, who both testified to the good character of defendant as being peaceable, &c., and whose means of knowledge rested on precisely the same foundation as that of the two witnesses whose testimony was excluded, namely, that they, though living in defendant's neighborhood, had never heard anything derogatory to his character, or that character talked about. The majority of my associates are, however, of opinion that the error was of such a prejudicial nature as to warrant a new trial, and so we reverse the judgment and remand the cause, in which reversal all concur except myself.

REVERSED.

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The State *ex rel.* Watkins v. Macon County Court.

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THE STATE *ex rel.* WATKINS V. MACON COUNTY COURT.

1. **Missouri & Mississippi Railroad Bond Tax:** COMMON FUND OF THE COUNTY. The tax of one-twentieth of one per cent. authorized by section 13 of the charter of the Missouri & Mississippi Railroad Company (Acts 1865, page 86) is the only tax authorized by law to be collected to pay bonds issued under that charter. The common fund of the county collected for the purpose of defraying the current expenses of the county government is not applicable to their payment.
2. **County Bond Tax:** LIMITATION ON THE RATE, PART OF THE CONTRACT: COUNTY REVENUE: MANDAMUS. One who takes county bonds issued under a statute which limits the rate of taxation that may be imposed for their payment to one-twentieth of one per cent., is chargeable with knowledge of the limitation. It enters into and forms part of the contract between him and the county; and the county court cannot be compelled, by mandamus, to appropriate other funds in the county treasury, raised for other purposes, to the payment of such bonds. Neither the fact that they have been reduced to judgment, nor the fact that the specific fund provided is inadequate, can change this rule.
3. **County Railroad Bonds:** COMMON FUND OF THE COUNTY. The extraordinary indebtedness incurred by a county in issuing bonds to pay a railroad subscription, is not one of the "expenses of the county" within the meaning of Wag. Stat., sec. 165, p. 1193, and cannot be paid out of the fund raised by taxation under that section.
4. ———: ———. The county court will not be compelled, by mandamus, to issue a warrant on the common fund of the county for the payment of railroad bonded indebtedness, when the result would be to withdraw from the treasury all the funds necessary for the support of the county government, and thus to disrupt and disorganize it.
5. **County Warrant:** MANDAMUS AGAINST COUNTY COURT. When the county court has refused the application of a creditor of the county, whose claim has been reduced to judgment, for a warrant on the treasury payable out of a particular fund, it will not be compelled, by mandamus, to change its decision and grant the warrant; 1st, Because its action on the application is judicial; 2nd, Because an appeal lies from its order to the circuit court.
6. **The case of The United States *ex rel.* &c., v. Clark County Court,** 96 U. S. Rep. 211, disapproved.



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*Appeal from Macon Circuit Court.*—HON. ANDREW ELLISON,  
Judge.

*J. L. Berry and S. J. Wilson* for relator.

The judgment is a general liability against the county, and payable out of the common fund of said county, and it was the duty of the county court to direct its clerk to issue a warrant on the county treasurer for its payment. Wag. Stat., sec. 28, p. 414, Ib., sec. 31, p. 415. By virtue of the provisions of the act of the General Assembly of Missouri, chartering the Missouri & Mississippi Railroad Company, Macon county subscribed to the capital stock of said railroad company to a large amount, and is, to-day, the owner and holder of such stock, and in consideration therefore, issued and delivered her bonds, stipulating therein, absolutely and unconditionally to pay her subscription, dollar for dollar, at the maturity of said bonds, and it matters not whether the stock is worth par or worthless, the liability of the county to pay the bonds is fixed and absolute. The tax of one-twentieth of one per cent. provided for in the act chartering said railroad company, was intended to give additional credit and commercial value to county bonds issued for subscription to the stock of said railroad company. The subscription was authorized to aid in the construction of a railroad, and it was certainly not intended by the act that the value of the bonds was to be impaired by the provision of a limited special tax to pay them, entirely inadequate, thereby defeating the very object for which the subscription was authorized. *U. S. ex rel. Johnson v. Clark County Court*, 96 U. S. 211.

*James Carr* for respondents.

Is there any other power to enforce the payment of these bonds and coupons conferred upon the county court of Macon county than to "levy a tax to pay the same, not

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to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year?" None. It is not so nominated in the act. The power to issue the bonds was created by the act, and by the act the power to enforce the payment was likewise conferred. Whatever this secures the relator is entitled to its full measure; no more; and the respondents do not ask him to take any less. There is no statute of this State, aside from the 13th section of the charter of the railroad company, which confers any authority on the respondents, as justices of Macon county court, to levy any tax at all for the purpose of paying the bonds in controversy. What then would be the effect of ordering a warrant to be drawn upon the common fund of the county? It would take every dollar out of the treasury and leave nothing to pay the expenses necessarily incurred in administering the county government. The money which had been levied and collected of the taxpayers of the county, according to law, would thus be diverted from its legitimate purpose, and perverted to one which was not only not authorized, but which was in fact against the direct wishes of nine-tenths of the tax-payers of the county, and *ex necessitate*, would disorganize it; for money is as much the *sine qua non* of government, as it is of war. This would be doing indirectly what the court could not do directly. Courts do not knowingly render judgments which produce, or even tend to produce, such anarchy.

It is the policy of the governments of all civilized countries to sustain themselves anyhow and at all events. The rights of the government are always held paramount to those of the citizen. It is upon this principle that the salary of a public officer is not subject to garnishment, the presumption being that he would not be able to perform his duty to the public without the regular payment of his salary. It is upon the same principle that the government drafts citizens into its military service, forcing them away from their homes, from father, mother, brothers, sisters,

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wife, children, friends, from everything that is near and dear to them, and placing them in the face of the enemy, in the valley of the shadow of death, to fight, to bleed, and, perhaps, to die. And it is upon the same principle that government is always a preferred creditor against every man's estate, solvent or insolvent. 1 Kent, 262; Rev. Stat. U. S., § 5101, p. 988; Wag. Stat., § 1, p. 101.

A county is a political subdivision of the State, and the county court is a part of the State government with specific powers, duties and functions generally local to the county, it is true, but derived from the State and not from the county. *Reardon v. St. Louis Co.*, 36 Mo. 561; *St. Louis Police Commissioners v. County Court*, 34 Mo. 546; *Steines v. Franklin Co.*, 48 Mo. 188; *Ray Co. v. Bentley*, 49 Mo. 236. The return shows that the effect of drawing a warrant upon the common fund would be to disorganize the county government. The county court is a part of the State government. This court will not lend itself to any such anarchical act.

Where a debt has been incurred by a county, with the understanding that it was to be paid out of a particular fund, such as the road and canal fund, the creditor of the county, if that fund turns out to be insufficient, is not entitled to resort to the common fund for payment. *Pettis Co. v. Kingsbury*, 17 Mo. 479; *Kingsberry v. Pettis County Court*, 48 Mo. 208; *The State v. Bollinger County Court*, 48 Mo. 475; *Campbell v. Polk Co.*, 49 Mo. 214. The section authorizing the respondents, as justices of Macon county court, to order the warrant to be drawn, and the section which empowers the county courts "to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property, and licenses made taxable by law for State purposes," (Wag. Stat., § 165, p. 1193,) should be so construed as not to disorganize or stop the wheels of the county government, although such construction might result in the county's judgment creditor not being paid anything out of the common fund

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of the county, which has been levied and collected for the express purpose of defraying the expenses of the county. The following cases hold that the current expenses of the county must be first paid before a general judgment creditor of the county is entitled to be paid, and the decisions are based on the inexorable necessity, that the county government must live, and the rights of the citizen are always subordinated to those rights. *Grant v. City of Davenport*, 36 Iowa 401; *Coffin v. Same*, 26 Iowa 315; *Iowa R. R. Land Co. v. County of Sac*, 39 Iowa 134; *French v. Burlington*, 42 Iowa 618; *Von Hoffman v. City of Quincy*, 4 Wall. 549; *Commonwealth v. Commissioners of Lancaster Co.*, 6 Binney 5.

NORTON, J.—This is a proceeding instituted in the circuit court of Macon county against the defendants as justices of the county court of Macon county, to compel them by mandamus to draw a warrant on the county treasurer of said county, payable out of the general expenditure fund. It is alleged in the petition that the relator obtained judgment in the circuit court of Macon county for the sum of \$3,645 against said county on certain bonds issued and delivered to the Missouri & Mississippi Railroad Company in payment of a subscription of stock to said company, made under and by virtue of the charter of said company; that said judgment is unpaid, and that the county has no property out of which said judgment, or any part thereof, could be made on execution; that the levy of one-twentieth of one per cent. on the assessed value of the taxable property of said county is wholly insufficient to pay said judgment and other judgments now subsisting against the county on other bonds issued to said company; that defendants, upon demand made, refused to issue their warrant to relator in discharge of said judgment to the county treasurer, payable out of the common fund of the county.

The defendants, in their return to the alternative writ,

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admit all the facts stated in the petition, and set up by way of further returns that the stock was subscribed and the bonds issued to said company under the provisions of the 13th section of said charter, which is as follows: "It shall be lawful for the corporate authorities of any city or town or county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year."

That in and by virtue of the power thus conferred, and no other, the said county court, without a vote of the people, and against the wishes of a large majority of the people, subscribed, on the 16th of April, 1867, \$175,000 to the capital stock of said company, and also on the 12th of April, 1870, made a like subscription of the further sum of \$175,000 under the same authority and no other, without a vote of the people and against the wishes of nine-tenths of the voters of said county; that the county court of said county has levied every year, since such subscriptions were made and bonds issued, a special tax of one-twentieth of one per cent. on the assessed value of all the taxable property in said county, which tax has been regularly collected and applied to the payment of said bonds and interest; that the tax thus collected was wholly inadequate to pay all the interest on said bonds; that the constitution of 1875, section 11, article 10, limits the power of the county to impose a tax for county purposes to 50 cents on the \$100 valuation; that section 165, chapter 118 Wagner's Statutes, provides that the "several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties by a tax upon all property and licenses made taxable by law for State purposes, but the tax shall in no case exceed one-half of one per cent. on all taxable property." That the tax thus authorized to be levied constitutes the common fund of the county, and that the whole amount thus raised

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is necessary to pay the current and necessary expenses of conducting the county government, and that no part of this fund is applicable to the payment of relator's judgment, and that a withdrawal of it for such a purpose would disorganize the county government.

A demurrer to the return was overruled and judgment was rendered for defendants, from which plaintiff has appealed. The record presents for our determination the simple question whether the common fund of the county, collected for the purpose of defraying the current expenses of the county government, is applicable to the payment of relator's judgment, and whether the county court can be compelled to draw a warrant on the treasurer payable out of said fund.

Without stopping to consider or determine whether, after a demand against a county has been put into judgment, mandamus will lie to compel the county court to issue its warrant on the treasurer in payment of same, we will proceed to the discussion of the question presented by the record. The only authority upon which the relator relies for issuing the bonds, is to be found in the 13th section of an act to incorporate the Missouri & Mississippi Railroad Company, (Acts 1865, p. 86,) which declares that "it shall be lawful for the corporate authorities of any city or town, or the county court of any county desiring to do so, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same not to exceed the one-twentieth of one per cent. upon the assessed value of the taxable property for each year."

This section has been construed by this court, in the case of the *State ex. rel. v. Shortridge et al.*, 56 Mo. 126. It was there held that section 13 of said act entered into and formed a part of the bonds themselves as much so as if it had appeared, *in hac verba*, on their face; and the effect of said section was to limit the power of the county court to a levy of a tax of one-twentieth of one per cent. for their

1. MISSOURI & MISSISSIPPI RAILROAD  
BOND TAX: common fund of the  
county.



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payment in any one year; and that this limitation was for the benefit of the tax-payers, and forbids the imposition of any greater tax than one-twentieth of one per cent. in any one year by the county court. The principle announced, that section 13 of the act entered into the contract, finds support in the case of *Von Hoffman v. City of Quincy*, 4 Wall. 554, and *Cooley Con. Lim.*, 285. It was also held that the power of taxation belongs alone to the State, and can only be exercised by virtue of laws passed by the General Assembly for that purpose, and that there can be no such thing as an implied power in a county court to levy a tax. We are disposed to adhere to the principles enunciated in that case, believing them to be supported both by reason and authority, and adhering to them we are forced to answer the question this record presents in the negative.

If, as was decided in that case, the county court of Macon county could not be compelled by mandamus to levy a tax in excess of one-twentieth of one per cent. to raise revenue with which to pay such bonds and the interest on them, as constituting the right of action on which the relator obtained his judgment, we are at a loss to perceive upon what principle the court could be compelled, by mandamus, to seize upon other funds in the treasury of the county, raised for another and different purpose, and apply them to an object not contemplated when the tax, which brought the revenue into the treasury, was imposed. The fact that the bonds and coupons have been put into a judgment, can neither enlarge nor diminish the powers of the county court in regard to providing for payment by levying a tax. To compel the county court to divert the common fund of the county from the purposes for which they had the lawful right to impose the tax, which produced these funds, and apply it to a purpose for which they had no lawful right to impose a tax beyond the limit prescribed by law, viz: one-twentieth of one per cent. would be doing indirectly, and by evasion, what we have decided could

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not be done directly. We can give no toleration to such a doctrine.

The very law authorizing the issuance of the bonds and coupons upon which relator obtained his judgment, provided for raising a specific fund out of which they were to be paid. This law entered into and formed a part of the contract, and when the subscription was made and the bonds issued to the company in payment of it, the company and all others into whose hands they might come, are chargeable with knowledge of the fact that they were to look for payment to a specific fund to be provided by the levy of a tax not in excess of one twentieth of one per cent. It is no answer to say that the fund provided is inadequate. The inadequacy of the fund to discharge the obligation cannot confer either on the county court or any other court the power to provide any other fund to meet the obligation, than that which the law authorizing the contraction of the debt had provided.

If the county court in subscribing \$350,000 of stock and issuing that amount of bonds to pay it, issued an amount in excess of what a tax of one-twentieth of one per cent. would pay, the company could have refused to accept the subscription on that ground. This, however, was not done. The amount of bonds and interest that an annual tax of one-twentieth of one per cent. would pay could have been ascertained almost to a mathematical certainty at the time the subscription was made and the bonds issued. Prudence on the part of the county court would have confined them to a subscription and the issuance of bonds to the amount which the fund authorized by the Legislature to be raised would pay, and fair dealing would have required the company to have refused to accept a subscription in excess of what could have been paid by it.

The intention of the Legislature in conferring the power on the county court to subscribe stock to this company to be exercised independent of, and even against the

2. COUNTY BOND  
TAX: limitation  
on the rate, part  
of the contract:  
county contract:  
mandamus.



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will of the tax-payers, doubtless was to confine them to such a subscription in amount as an annual tax of one-twentieth of one per cent. on all the taxable property would pay, and it may seriously be questioned whether the bonds issued in excess of that amount have any binding force. If section 13 of the act of 1865 entered into and formed a part of contract which this court, in the case of *The State ex rel. v. Shortridge, supra*, declared it did, then it follows under the following cases heretofore decided, the holders of the bonds can only look to the fund which section 13 provides, and when that is exhausted they have no authority of law to demand of the county court that they resort to another and different fund provided for other and different purposes. In the case of *Campbell v. Polk County*, 49 Mo. 214, it was held that when a county warrant was made payable out of a particular fund the holder of such warrant, after such fund had been exhausted, could not recover against the county in an action thereon. In the case of *Pettis County v. Kingsbury*, 17 Mo. 479, it was held that a contractor who had built a bridge to be paid for out of the road and canal fund could not compel the county to pay a warrant (drawn payable out of said fund) with the common fund of the county. In the case of *Kingsberry et al. v. Pettis County*, 48 Mo. 208, the doctrine of the above cases was approved. Considering section 13 as entering into the contract in this case as fully as if it had been copied on the face of the bond, the legal effect of it is to make the bonds payable out of the special fund there provided for that purpose, and to bring this case within the principle announced in the above cases.

The contract made between the county and the Missouri & Mississippi Railroad Company was that if the county court subscribed for stock in said corporation, the company would accept bonds therefor, to be paid by funds derived from a tax of one-twentieth of one per cent., to be annually levied on the assessed value of all the taxable property in said county. The record before us shows that

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this contract thus made has been fully executed. The county court made the subscription which the company accepted, and it received the bonds of the county therefor, to be paid as section 13 of the act of incorporation provided, and the tax therein authorized to be levied has been regularly levied, and the proceeds, so far as they would go, have been applied to the payment of said bonds. If the contract and the law which authorized it to be made have been fully complied with, that is an end of the matter and is all that plaintiff is entitled to. And, if for the purpose of paying these bonds, the county court of Macon county was powerless, as we have decided, to levy a tax exceeding one-twentieth of one per cent., it necessarily follows that they cannot be forced to pay them out of funds raised by taxation for a different purpose. If this were allowed to be done, it would be equivalent to enlarging the powers of the county court and giving them a right to levy a tax greater than one-twentieth of one per cent. for the purpose of paying these bonds, which this court, in *The State v. Shortridge, supra*, held they could not do, but were forbidden to do. They could no more be compelled to pay a warrant drawn upon the treasurer payable out of the general expenditure fund, out of the fund authorized to be raised by section 13, *supra*, than they could be compelled to pay out of the general fund of the county a bond issued under section 13 which provides a special fund for its payment. It will not be pretended that the holder of a warrant payable out of the general expenditure fund could compel, by mandamus, the county court to take the special fund which section 13, *supra*, provides for the specific purpose of paying the bond issued thereunder, and apply it to the payment of such warrant, and we do not see how the holder of a claim payable out of the special fund, can compel the county court to resort to the common fund of the county to pay it, any more than the holder of a warrant to be paid out of the common fund can enforce its payment out of this special fund.

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The simple fact that the tax authorized to be levied will not bring sufficient money into the treasury to pay the bonds will not justify us, in the language of Judge Scott, in the case of *Pettis County v. Kingsbury*, "by a kind of judicial midwifery deliver the statute of an interpretation" which would give to the county court of Macon county a power that we have held they could not under the law exercise. If the tax provided is insufficient to meet the payment of the bonds and interest intended to be paid by it, it demonstrates either a deficiency in the law, which we have no right to remedy, or an unwise exercise of power by the county court in issuing a larger amount of bonds than the tax they were allowed to impose would pay, and the folly of the company in accepting such subscription. It may have been a hard bargain, an unwise and imprudent contract that was entered into between the county and the corporation it was contracting with. We have no power to change it or to alter its terms. Our simple duty is to enforce it as the parties themselves have made it. The time may yet come when the sanguine expectations of the promoters of the project of the development of the county and the increase of its wealth will be realized, and that a tax of one-twentieth of one per cent. will raise a fund adequate to the discharge of the obligation. We have a right to presume that a purchaser of these bonds, chargeable with knowledge of the fact that the county court had no legal power to impose a greater tax than one-twentieth of one per cent. to pay them, would be governed by it in fixing the price he would be willing to pay for such paper. We also have a right to presume, from the fact stated in the return and admitted in the answer, that only seventeen miles of the road were built, and this entirely outside of Macon county, that this fact was considered, and that the bonds brought but an inconsiderable sum.

To give section 13, *supra*, the interpretation contended for by relator, would make it operate as a practical fraud, both on the county court and the people whose faithless

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agent the court was, if the fact admitted by the demurrer, that the bonds were issued against the protests of nine-tenths of the people, be true. The county court, as well as the people, had a right to conclude that the Legislature intended that, for the payment of the bonds issued by the county under the charter, the people should not be taxed beyond the limit prescribed in the act, and that if they issued an amount of bonds in excess of what they would pay, then the company, as well as others, would take them at their peril and subject to such future increase of the assessable value of property in the county as would ultimately secure their payment.

In the case of *Supervisors v. United States*, 18 Wall. 77, it is observed that "a mandamus will not be awarded to compel county officers of a State to do any act which they are not authorized to do by the laws of the State, from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being. The office of a writ of mandamus is not to create duties, but to compel the discharge of those already existing." The same doctrine as to the character of such officers is asserted in the case of *Reardon v. St. Louis County*, 36 Mo. 560. In the light of these adjudications, and to a proper determination of the question presented by the record before us, it is important to ascertain for what purposes the common fund of the county can be applied. This is especially so in view of the act of 1874, page 45, which provides as follows: "That if any person, \* \* \* being a member of any court, \* \* \* shall knowingly vote for the appropriation, disposition or disbursement of any money or property belonging to any such \* \* \* county, other than the specific use for which the same was devised, appropriated and collected, or authorized to be collected by law, \* \* \* such person so voting for, aiding, advising or promoting such illegal appropriation,

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disbursement or disposition of any such money or property, shall be deemed and taken, if such illegal appropriation, disbursement or disposition of such property be in fact effected, to have feloniously embezzled and converted said money or property; and if such illegal appropriation, disbursement or disposition be not effected, then such person so voting, advising or promoting the same shall be deemed and taken to have feloniously attempted to embezzle and convert to his own use such money or property, and on conviction thereof shall be punished by imprisonment in the penitentiary for a period not exceeding five years, and by a fine not exceeding four fold the value of such money or property."

What, then, are the purposes for which the general expenditure or common fund of a county is raised? A proper answer to this question can only be returned by the law which authorizes a levy of taxes to produce it. That law is to be found in Wagner's Statutes, section 165, page 1193, and is as follows: "The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties, by a tax upon all property and licenses made taxable by law for State purposes, \* \* \* but the county tax shall in no case exceed one-half of one per cent." The revenue derived from the tax thus authorized to be annually imposed, is in the very terms of the law declared to be to defray the expenses of the county, which we understand to mean the ordinary current expenses incurred in conducting the county government, such as the payment of grand and petit jurors, witnesses summoned before the grand jury, costs of criminal prosecutions, expenses in supporting the poor and insane of the county, salaries of officers, assessing and collecting the revenue, &c.

That an extraordinary indebtedness incurred by a county in subscribing stock to a railroad corporation and in issuing bonds in payment, was never intended by the

3. COUNTY RAIL-  
ROAD BONDS: com-  
mon fund of the  
county.

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General Assembly to be embraced in the words "expenses of the county," or that they contemplated the creation of any debt for county purposes is manifest from section 166, which makes it the duty of the county court, after the assessor's book has been adjusted and returned, "to ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes so as to raise the required sum." If section 165, *supra*, was intended to authorize the creation of debts or provide for their payment, the General Assembly would, doubtless, have so expressed themselves as they did in sections 1 and 7, page 1158, of the same law in providing for the levy of State taxes. Section 1 provides that "for the support of the government of the State, the payment of the State debt, \* \* \* taxes shall be levied on all property, real and personal," \* \* \* and section 7 provides that there shall annually be levied, assessed and collected on the assessed value of all the real and personal property subject to taxation in the State, one-fifth of one per cent. for State revenue, and one-fourth of one per cent. for the payment of all State indebtedness. The State revenue thus provided is in express terms for the support of the State government, and the county revenue provided for in section 165 is for the payment of the expenses of the county government.

That such an extraordinary indebtedness as is incurred by a county in issuing bonds in payment of a railroad subscription was not intended to be embraced in the terms "expenses of the county," is apparent when it is considered that the very same words used by the General Assembly in section 165, are to be found in section 20, Revised Statutes 1825, page 671, except in the latter act, the tax authorized was limited to 50 per cent. of the amount of State tax. The same section was continued in the Revised Code of 1835, except that the amount of tax was in no case to exceed the amount of the State tax. It is also to be found in the code of 1845, and that of 1855, the only difference being that in the former the rate of taxation was



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not to exceed 34 cents, and in the latter not to exceed 40 cents on a valuation of \$100. It is clear that the General Assembly in 1825 and in 1835, when they authorized the county courts to levy such tax from time to time as should be necessary for defraying county expenses, could have had no reference to such indebtedness as arises from a county bond issued in discharge of a subscription to the stock of a railroad corporation, because, at that time, there was no law to be found on our statute books authorizing such subscriptions or the issuance of any such obligations.

The first statute conferring such authority was in 1837, (Acts 1837, p. 247). The identical provisions of the codes of 1825 and 1835 having been continued or transferred on the revised codes of 1845, 1855 and 1865, we are justified in concluding that they were transferred with the same meaning as when first adopted, and that it was not designed to include in the county expenses therein provided for, bonds issued by a county in payment of a railroad subscription. This conclusion, we think, is fully confirmed by the fact that as early as 1855 the General Assembly made other and different provisions for levying a tax and creating a fund for the payment of such obligations. This will be seen by reference to sections 30, 31, 32 and 34 of the Revised Statutes 1855, volume 1, page 427, 429. Section 30 provides that it shall be lawful for the county court of any county \* \* \* to subscribe to the capital stock of any railroad company duly organized under this or any other law of this State. Section 31 provides that when such subscription is made, in order to raise funds to pay it, it shall be the duty of the county court making such subscription to issue bonds or levy a special tax upon all "property and taxables" made taxable by law for State and county purposes, and upon the actual capital that all grocers and merchants may have invested in business, \* \* \* to be kept apart from other funds and appropriated to no other purpose than the

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payment of such subscription. The only limitation on this is, that it shall not exceed in any one year 30 per centum of the subscription. Section 32 provides, "That for such taxes levied the county court shall cause to be issued and delivered to persons paying such tax, a certificate of the amount thereof paid, which certificates shall be transferable and convertible into stock of the railroad whenever presented in amounts equal to one or more shares of the stock of such railroad." It also declares that the assessment, collection and payment of the taxes authorized shall be enforced as any other taxes for county or highway purposes. Section 34 provides that, "Any county court or city which has heretofore subscribed to the capital stock of any railroad in this State, shall be entitled to the privileges and subject to the liabilities of other stockholders in such company, and the county court or city council shall have all the rights and powers to provide funds to pay such subscription as are granted to county courts and cities under this act, and may levy a special tax to pay the interest on their bonds, or to provide a sinking fund to pay the principal."

Sections 17, 18, 19 and 21 of the General Statutes 1865, pages 338, 339, are in all respects like those contained in the revised code of 1855, except the power of the county court to subscribe is made dependent upon the assent to such subscription of two-thirds of the qualified voters of the county, expressed at a regular or special election to be held therein.

It thus appears that the fullest provisions have been made by the General Assembly for the creation of a fund distinct from the general expenditure or common fund of a county out of which to pay an indebtedness incurred by a county on account of a subscription to stock of a railroad company or bonds issued in payment thereof, which fund is to be kept separate from all other funds, and to be applied to that identical purpose and none other. These various provisions of law have been referred to for the



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sole purpose of establishing the proposition that for the payment of such obligations resort could only be had to the special fund, and that it never was the intention of the Legislature that the common fund raised by taxation to defray the expenses of the county could be made chargeable with their payment, but on the contrary that such latter fund was devised, provided and intended to be charged with the payment of such ordinary expenses incurred in conducting the county government as has been hereinbefore indicated. We, therefore, think that it is manifest that the fund raised by a tax of one-half of one per cent. to defray the expenses of the county cannot be applied to the payment of relator's demand, and it follows that each member of the county court of Macon county, who would knowingly vote for so applying it, and thus diverting it from the purpose for which it was collected, would be guilty of a crime and subject himself to the penalty of the act of 1874, *supra*; and as mandamus will not issue to compel an officer to do that which he is not only not authorized, but absolutely forbidden to do, the trial court was justified in denying the writ.

Again, the demurrer was properly overruled on the ground that the effect of granting the writ would be to 4. —: —. disrupt and disorganize the county government. It is shown by the return that the taxable value of the property in the county was \$4,853,584, and that the revenue which a tax of one-half of one per cent. thereon would produce, is required in carrying on the county government, and after applying it to that purpose there would be nothing in the treasury with which to pay a warrant if drawn. In the case of *Price v. County Commissioners of Philadelphia County*, 1 Whar. Rep. 1, which was a proceeding to compel, by mandamus, the county commissioners to draw orders on the county treasurer in payment of certain claims against the county, it is observed by the court "that it appears by the affidavit of the commissioners that there is no money in the treasury except that which

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is wanted to defray the ordinary expenses of the county. The writ of mandamus is not of course. It will be granted when a plain case of necessity is shown, and when, in the discretion of the court, it appears advisable. In this we should probably stop the wheels of the county government if the mandamus were allowed." The writ was denied.

So in the case of *Commonwealth v. Commissioners of Lancaster County*, 6 Binney 5, which was a proceeding to compel the commissioners to draw an order on the treasurer for \$58,444, the court observes "that the commissioners say they ought not to draw the order because there is not money in the treasury sufficient to answer it. No doubt they speak the truth, and it appears to be cause insurmountable against issuing the writ. Whether the commissioners have done wrong in not taking measures to bring money into the treasury is not now the question. If they have, we have no right to punish them in this way. What would it signify to draw a warrant on an empty treasury? The treasurer would refuse payment, and there the matter would end." The same principle is announced in the case of *Coy v. City of Lyons*, 17 Iowa 1; *Coffin v. City of Davenport*, 26 Iowa 315; 36 Iowa 401, and also sec. 352, High Ex. L. Rem.

At the time the subscription was made and the bonds of Macon county were issued in payment of it, section 165, *supra*, was the only law authorizing the county court to levy a tax to raise money out of which to defray the expenses of the county, and this tax could not exceed one-half of one per cent. Under section 11, article 10, of the constitution, it is provided that the annual rate of taxation on property in counties having \$6,000,000, or less, shall not, in the aggregate, exceed 50 cents on each \$100 valuation. While this restriction applies to taxes for county purposes, it is expressly provided in the same section that "it shall not apply to taxes to pay valid indebtedness now existing or bonds which may be issued in renewal of such indebtedness." It is, therefore, manifest that the county court

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of Macon county, (the property in said county being less than \$6,000,000 in valuation,) cannot levy, nor be authorized to levy for county purposes, a tax in excess of one-half of one per cent. in each year. It is also manifest from the return that if the fund arising therefrom is diverted from such purpose the county government will be overthrown and left without support. When it is considered that the State is dependent upon the machinery of its county governments for the assessment and collection of taxes for its support, and the payment of its debt, we cannot so exercise our discretion as to direct the issuance of a writ in this case and thus establish a principle tending to overthrow the county governments, and thus to impair the power of the State to maintain itself.

The writ was properly denied to relator, because the principles of law governing courts in granting it do not accord it to him. The office of mandamus is "to compel the performance of ministerial acts, or it is addressed to subordinate judicial tribunals, requiring them to proceed to exercise their functions and give judgments in cases before them. Mandamus will not lie to compel an inferior tribunal to give a particular judgment, or to reverse its decision when it has once acted, its peculiar scope and province being to prevent a failure of justice from delay or refusal to act. When the subordinate tribunal acts judicially, it may be compelled to proceed, but it will be left to decide and act according to its best judgment. In such case the party aggrieved by the decision has his remedy either by appeal or writ of error, and mandamus never issues, except when the petitioner has a specific right and no other remedy." *State ex rel. v. Lafayette County*, 41 Mo. 224.

It, therefore, becomes important to determine whether defendants, in discharging the duties imposed upon them of ascertaining the amount due from the county and ordering a warrant on the treasurer therefor, were acting judicially or ministerially. The answer to this question is to

5. COUNTY WARRANT: mandamus against county court.

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be returned by the law which imposes the duty, and it is as follows: "When the court shall ascertain any sum of money to be due from the county, they shall order their clerk to issue a warrant therefor in the following form: Treasurer of the county of \_\_\_\_\_ pay to \_\_\_\_\_, \_\_\_\_\_ dollars out of any money in the treasury appropriated for county expenditures (or express the particular fund as the case may require). Given at the court house this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

By order of the county court."

A. B., President.

Attest: C. D., Clerk.

Wagner's Statutes, section 31, page 415.

Under this section, before any warrant can be drawn on the treasurer, the court must first ascertain the amount due, and the fund out of which it is to be paid, and under section 28, of the same act, it is clothed with all necessary judicial power to perform the duties thus devolved upon it. We, therefore, think that in the ascertainment of what is due from a county and the fund out of which it is to be paid, (both of which must be determined before a warrant can be drawn,) the court is acting judicially. This principle is fully enunciated in the case of the *International Bank of St. Louis v. Franklin County*, 65 Mo. 112. When a demand against a county is presented to the county court, the usual form of entry may be exemplified thus: A. B. vs. \_\_\_\_\_ county. The account of A. B. for the sum of \_\_\_\_\_ dollars, being presented and inquired into, it is found by the court that the sum of \_\_\_\_\_ dollars is due him from the county, payable out of (the general expenditure fund, or road and canal fund, bridge fund, railroad tax fund, interest fund, as the case may require), and for which the clerk is ordered to issue a warrant. One of the judicial functions we are called upon in this proceeding to perform for the county court, viz., to determine the fund out of which relator's claim is payable, and then command the court, not to proceed and render a judgment, but to execute the

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judgment rendered by this court. This, under the authorities cited, we cannot do. The utmost that we could do would be to direct the county court to proceed and render judgment when they refused to act, and if in acting they render a wrong judgment, the remedy is by appeal, which is allowable under our statute, from all judgments and orders from the county court when not expressly forbidden.

But conceding, only for the argument, that the county court in ordering a sum of money ascertained to be due from the county to be paid out of a particular fund, is acting ministerially, still the relator would not be allowed the writ of mandamus unless he had no other remedy, it being well settled that such writ only issues when the party has no other remedy. If in such case the county court err in directing the payment of such claim out of the wrong fund, our statute affords an ample remedy by appeal from the wrongful order, for it expressly provides that the "circuit courts shall have appellate jurisdiction from the judgments and orders of county courts and justices of the peace, in all cases not expressly prohibited by law." Wag. Stat., sec. 2, p. 430. It has been determined that this appellate jurisdiction of the circuit courts can be exercised by appeal. *County of Boone v. Corlew*, 3 Mo. 12; *Lewis v. Nuckolls*, 26 Mo. 279; *Lacy v. Williams*, 27 Mo. 280. So that it appears, whether the county court, in ordering the payment of a sum of money ascertained to be due from the county out of a particular fund, is acting either judicially or ministerially, the relator would not, in either case, be entitled to the writ, for if defendants were acting in the former capacity we cannot control their judicial discretion by directing them to give a particular judgment, as the judgment that they shall render is for them and not for us to determine; if acting in the latter capacity, and they make an erroneous order, the party aggrieved has his remedy by appeal. It, therefore, follows that in either instance the writ of mandamus must be refused, in the first, because we cannot thus interfere with judicial discretion, and in

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the latter because there being a remedy by appeal, in such case mandamus does not lie. *United States v. Lawrence*, 3 Dall. 42; *Griffith v. Cochran*, 5 Binney 87; 14 East 395.

We have been cited to the case of *United States v. Clark County*, 6 Otto 211, in support of relator's case. The opinion in that case, emanating from the highest recognized authority in this country, did not meet with the sanction of a large minority of the court. This, in connection with the fact that it was expressly decided in the case of the *State v. Shortridge*, *supra*, that section 13, *supra*, of the act incorporating the Missouri & Mississippi Railroad Company was a limitation on the power of the county court to levy a tax beyond the amount therein specified, and the further fact that the various acts to which we have referred herein, were neither called to the attention of the court nor considered, we are driven to a different conclusion from that announced in that case.

The judgment of the court in overruling the demurrer and refusing the writ, is affirmed, in which SHERWOOD, C. J., and HENRY, J., concur. Judge HOUGH concurs in a separate opinion. Judge NAPTON having been of counsel in the case of *State ex. rel. v. Shortridge*, did not sit.

AFFIRMED.

HOUGH, J., CONCURRING.—I concur in affirming the judgment of the circuit court refusing the writ of mandamus, but do not concur in all the reasons given therefor. I adhere to the decision of this court in the case of the *State v. Shortridge*, 56 Mo. 126, and if this were a proceeding to compel the county court to levy a tax to pay the bonds, it would be directly in point. I doubt, however, whether we are at liberty to go behind the judgment in favor of the relator, and inquire into the cause of action, or obligation upon which it is founded, and then say that the judgment must be paid according to the terms of the contract on which it is based. The judgment should have

6. THE CASE OF THE  
UNITED STATES EX  
REL., &C., V. CLARK  
COUNTY COURT, 96  
U. S. REP 211, DIS-  
APPROVED.



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followed the contract; and in that it does not, it is an erroneous judgment; it is a general judgment entitling the relator to a general execution, and if the county has property subject to execution, it might be sold thereunder. The contract is merged in the judgment, and it cannot, in my opinion, now be looked to to determine the rights of the relator under his judgment. Sufficient reasons are given in the opinion of the court for refusing the writ without going behind the judgment in favor of the relator. *Vide. State ex rel. Zimmerman v. The Justices of Bollinger County Court et al.*, 48 Mo. 475.

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THE STATE V. ROTHSCHILD, *Appellant*.

**Criminal Law:** EVIDENCE: PRACTICE. On the trial of a criminal case a witness for the prosecution testified that he had been induced to leave the State, and had received money for that purpose. The evidence failed to connect the defendant with the transaction. But the judge and the prosecuting attorney instituted an inquiry for the purpose of showing by the witness that the parties implicated were certain officers of the law. The defendant having interposed frequent objections to the prosecution of this inquiry, the judge remarked in the presence of the jury: "I am asking for this testimony. This case seems to have been born in sin and brought forth in iniquity. That is the reason I asked those questions. If the officers of this court, and of this city, of these United States, are to get before the grand jury evidence without preferring preliminary charges in the preliminary courts, and then buy off witnesses without any preliminary examination, I will see that they are brought to justice, and that, too, speedily, without any preliminary charges. If the defendant is not connected with it, it can be withdrawn from the jury by instruction." But the evidence was not so withdrawn; *Held*, that the conduct of the court was error, requiring the reversal of the judgment, and would have been error even if the evidence had been withdrawn.

*Appeal from St. Louis Court of Appeals.*

*Joseph G. Lodge* with *Chas. P. Johnson* and *C. C. Simons* for appellant.

*J. L. Smith*, Attorney-General, for the State.

SHERWOOD, C. J.—Defendant was indicted for the larceny of some United States bonds; on trial had, was convicted, which conviction was affirmed in the St. Louis court of appeals, and he now appeals here.

Counsel for defendant have filed an elaborate brief, in which they object to many of the rulings of the criminal court. We think it unnecessary to advert to many of the objections thus urged, because we think that the case was, with some exceptions to be presently noted, very well tried, and as to evidence of defendant's guilt, there was certainly enough to go to the jury for the purpose of letting them say whether the defendant had formed a larcenous intent when he picked up the bonds from the floor where they had fallen. And such unlawful intent could be legitimately inferred from the subsequent conduct of defendant in relation to the bonds; conduct which it would be somewhat difficult to explain, save upon the theory of defendant's guilty intent formed at the outset of the transaction. In this view of the case, we need not rely on the testimony of Samuels, whose testimony, he being an accomplice, should be received with appropriate caution; 1 Whart. Ev., § 414. 1 Greenl. Ev., § 380; *State v. Jones*, 64 Mo. 391; but may look alone to the intrinsic improbabilities of defendant's own statement. Taking only that statement as our guide, it is hard to divest the mind of the conviction that defendant's zealous solicitude and care for the safe keeping of the bonds, when he first obtained possession of them, was singularly at variance with his gross carelessness in exposing them to open view in his wardrobe, in his rooms, to which a negro boy had daily access, and which a gambler, by defendant's permission, occupied. Nor did defendant's conduct comport well with honest in-

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tention, in that he did not resort to the usual modes to discover the owner if unacquainted with him, nor to deliver the bonds to him if he was acquainted with him, as seems to have been the case. We have thought proper to allude to the evidence in this general way, because it is claimed that the weight of evidence was decidedly in favor of defendant's innocence. We do not think so.

We pass now to the consideration of those matters which must result in a reversal of the judgment. It appeared from the testimony of Samuels, that during the pendency of the prosecution, he had been induced to leave the State, and that money was paid to him by one Looney for that purpose; and the endeavor was made by the State to connect the defendant therewith. In this endeavor the witness was allowed to state that he did not know from whom the money came; that he "*expected*" the money came from Rothschild. He was then asked if he had ever seen any letter that was written by Rothschild, when he replied: Not by Jimmy Rothschild, but from his brother. This question and answer were objected to, but without success. The witness was then asked: Do you know of any other witness that was *tampered* with? Upon this question being objected to as an assumption, the question was changed to this form: Do you know of the defendant's tampering with any witnesses? When witness answered, I don't. Similar replies were made as to whether the letter referred to was written by defendant, and as to whether witness knew the person to whom it was addressed; and as to whether witness knew of any letters having been written by defendant. Notwithstanding the failure to connect the defendant with furnishing the money which enabled the witness to get away, the prosecuting attorney was allowed, against the objection of defendant's counsel, to ply the witness with questions, and to receive answers thereto, as to the money received by him, being sent to Frank Conway, in the absence of witness, and as to whether from witness' own knowledge, the person who paid him

the money and *tampered* with him, came from defendant? To this last question an answer was returned in the negative. The court then took the witness in hand, and although continual objections were made by defendant's counsel, proceeded to show by the witness that Looney, Reinstaedler and Egan had induced him to leave the city, and had sent for him to come back, that "it would be all right." After these questions were asked and answers elicited, the prosecuting attorney repeated his question respecting Officers Egan and Looney eloigning the witness, and objection again being made and overruled, the court remarked: "I am asking for this testimony. This case seems to have been born in sin and brought forth in iniquity. That is the reason I asked those questions. If the officers of this court, and of this city, of these United States, are to get before the grand jury evidence without preferring preliminary charges in the preliminary courts, and then buy off witnesses without any preliminary examination, I will see that they are brought to justice, and that, too, speedily, without any preliminary charges. If the defendant is not connected with it, it can be withdrawn from the jury by instruction."

But the evidence was not withdrawn from the jury by instruction as promised; it, therefore, went to them, and remained with them, under the direct sanction of the court. The jury, under such circumstances, would very naturally infer that defendant was in some way concerned, through the agency of others, in getting the witness out of the way, so as not to testify against him. It will not do to say that the testimony, being irrelevant, did defendant no harm, since the court had sanctioned its relevance by admitting it; by promising to withdraw it by instruction, and by failing to do so. The effect of the irrelevant testimony was thus just as damaging, to all intents and purposes, as if it had, in truth and fact, connected defendant with the alleged attempt to tamper with and remove the witness from the State. If the minds of the jury were

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then nicely balanced; were wavering between the innocence and guilt of defendant, this objectionable testimony stamped, as it was, with reiterated judicial approbation, was sufficient to turn the scale in favor of his conviction. *State v. Jaeger*, 66 Mo. 173. And the attention of the court was pointedly called to the error thus committed in the motion for new trial. But even had the court performed the promise made, and given an instruction withdrawing the objectionable evidence from the jury, the error of admitting it would not thereby have been cured. As was said in a similar case: "It had poisoned their minds, and its effects could not be erased from their memories." *State v. Daubert*, 42 Mo. 242; *State v. Mix*, 15 Mo. 153; *State v. Wolff*, 15 Mo. 168; *State v. Marshall*, 36 Mo. 400.

As the cause must be re-tried, we have deemed it unnecessary to review the alleged errors in greater detail. Judgment reversed and cause remanded. All concur.

REVERSED.

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BARNETT V. ATLANTIC & PACIFIC RAILROAD COMPANY, *Appellant*.

1. **Railroad Double-damage Law:** IT IS PENAL AND NOT UNCONSTITUTIONAL. That clause of the 43d section of the railroad law which allows double-damages to the owner of stock killed on a railroad through the failure of the company to maintain such fences as the law requires, is a police regulation chiefly intended for the protection of the traveling public, and is penal in its nature. But in giving the penalty to the owner instead of the public school fund, it is not in conflict with section 5, article 9, of the constitution of 1865, which provides that "the net proceeds of all sales of lands and other property and effects that may accrue to the State by escheat, \* \* \* or from fines, penalties and forfeitures," shall go to the public school fund; nor with section 8, article 11, of the constitution of 1875, which provides that "the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State," shall go to

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that fund. Both of these provisions refer only to such fines, penalties and forfeitures as the Legislature might provide should accrue to the State.

2. **Action to Recover Double-damages:** JUSTICE'S JURISDICTION MUST APPEAR: PRACTICE IN SUPREME COURT. In an action for double-damages against a railroad company under the 43d section of the railroad law, brought before a justice of the peace, it must appear either from the statement filed with him, or from his transcript of the proceedings, that the stock was killed in the township in which the suit was brought. If it does not so appear, the objection of want of jurisdiction may be raised for the first time in the Supreme Court.

*Appeal from Pettis Circuit Court.*—HON. WILLIAM T. WOOD,  
Judge.

C. M. Napton for appellant.

1. The double-damage law is either compensatory or punitive. It was intended to be the remedy by which a person should be compensated for damage to his stock, or, it may be regarded as a fine imposed or penalty inflicted upon the corporation for failure to fence the road. Or, again, it may be considered as both compensatory and punitive. *Gorman v. Pacific R. R.*, 26 Mo. 450; *Trice v. Hann. & St. Jo. R. R.*, 49 Mo. 440; *Hudson v. St. L., K. C. & N. Ry. Co.*, 53 Mo. 536; *Seaton v. R. R. Co.*, 55 Mo. 416.

2. If it be a penal statute it cannot stand, because it violates section 8, article 2, of the constitution of 1875. Under that section fines and penalties can be imposed only for the benefit of the county school fund.

3. When looked upon as a law granting to the owner of stock compensation for his loss, it involves the gravest questions. The right of property carries with it the right to receive an equal and just compensation for a deprivation of it; and thus the equivalent becomes an incident of and necessarily incorporated with the right of property itself. One who is deprived of his property is entitled to its equivalent, but whenever he receives one cent beyond that; the very principle on which he receives anything is



violated. A law authorizing this conflicts with that provision of the constitution which declares that no private property can be taken for private use, with or without compensation, unless by consent of the owner. I do not say that punitive damages may not be given in a proper case. They are given expressly in consideration of some extreme suffering or hardship. But the right to recover double-damages expressly authorizes the taking of a certain amount of the property of one person and giving it to another, after all damage has been fully compensated for, and no such consideration as malice or bodily pain or mental anguish enters into the case, as is true of cases where punitive damages may be recovered. And punitive damages, or "smart money," were given at common law, and do not arise out of the violation of a statute. Section 43 is in conflict with article 2, section 30 of the constitution. It is that "no person shall be deprived of life, liberty or property without due process of law." The phrase "due process of law," has been held equivalent to "the law of the land," and a statute to be the law of the land must be one which the Legislature had the power to pass. *Sheppard v. Johnson*, 2 Humph. 285; *State v. Doherty*, 60 Me. 509; *State v. Simons*, 2 Spear 767. These phrases refer to pre-existing rules of conduct, and are designed to exclude arbitrary power from every branch of the government. They do not mean merely a legislative enactment.

4. If the Legislature has power to authorize double-damages, it also has power to authorize the damages to be quadrupled or increased ten fold, or a hundred fold. It is a question of the constitutional power of that body, and if it be once conceded to exist, then there is no protection to the citizen save a supposable sense of justice in legislators, and if this should be illusory, confiscation could be justified as easily as double-damages. It may, however, be said that double-damages are not excessive, and that as soon as the damage, by being enlarged, became excessive,

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it would conflict with article 2, section 25, of the constitution, which provides that excessive fines shall not be imposed. And this might be held to answer the reasoning next preceding. But we have seen that this double-damage cannot be regarded as a fine or penalty at all; if it be, it is unconstitutional. Now, I regard it as altogether compensatory, and the question recurs, can the Legislature force one to compensate another twice, ten times, or twenty times, for an injury? When regarded as compensatory only, there is no theory upon which the law can be supported. *Parish v. M. K. & T. Ry. Co.*, 63 Mo. 286; *A. & N. R. R. Co. v. Baty*, 6 Cent. Law Jour. 148.

5. There was nothing in the transcript from the justice to show that he had jurisdiction; and the complaint filed before him nowhere appears in the record.

*Heard & Jackson* for respondent.

1. The primary object of this law is the protection of the traveling public, and that, in this view, it is a constitutional police regulation, has been uniformly held. *Gorman v. P. R. R. Co.*, 26 Mo. 441; *Clark v. Hann. & St. Jo. R. R. Co.*, 36 Mo. 219; *Trice v. Hann. & St. Jo. R. R. Co.*, 49 Mo. 440; *Thorpe v. Rut. & Bur. R. R.*, 27 Vt. 140; Cooley on Const. Lim., 573, 579. Once concede this point and every other difficulty is removed. That portion of the section which requires railroads to fence their tracks, is the police regulation, and the portion which makes them liable for double-damages is remedial. If the Legislature has power, as unquestionably it has, to require railroads to be fenced, then it has power to compel a compliance with the requirement. If it can prohibit the evil, it can apply the remedy. The remedy is a matter of legislative discretion, and the Legislature may provide such liability, to be enforced in such manner, and payable to such persons, as, in its judgment, will be most effective to secure a compliance with the law. And this discretion and judgment will

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not be interfered with by the courts. Cooley on Const. Lim., 168, 169; *Phelps v. Racey*, 60 N. Y. 10. As an incident to this remedy is the compensation that the injured party receives.

2. The remedy in this law may be said to have a dual character—that is, it is penal and compensatory. Penal, in so far as it imposes a liability for a failure to comply with the requirements of the law, and compensatory in so far as it provides that the liability shall be for the benefit of a party injured by the failure to comply. But this compensatory feature of the remedy cannot abridge the constitutional power of the Legislature to establish the police regulation as the prime object of the statute.

3. For this argument, it must be taken as conclusive that the legislative judgment was that the most efficacious remedy was to be found in allowing a party suffering a loss to recover double-damages—just as in some cases of trespass the best remedy was considered to be in giving the injured party double-damages, and in other cases of trespass treble-damages; as in cases of protests of notes and bills, the best remedy was found in giving four and ten per cent. damages; as in appeals to this court, the best remedy to prevent frivolous appeals was supposed to be to give ten per cent. damages; as in order to prevent neglect on the part of any one authorized to solemnize marriages, any person who will, may recover the \$50.00 imposed for failing to record certificates; as in cases of mortgagees failing to enter satisfaction, an absolute penalty of ten per cent. of the mortgage money, in addition to actual damages, is given to the debtor; as by section 36 of this same law, the \$10 imposed for failing to deliver a baggage check, is given to the owner of the baggage; and as in all *qui tam* actions the best remedy is considered to be offering to some individual a part or all of the fine or penalty. \* But, it is said, if the Legislature can impose double-damages, it may go further and impose ten-fold, or a hundred-fold, the actual value of the stock. So it might, and so it should, if

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necessary to enforce obedience to a regulation designed for the security of human life. In fact, the history of this legislation proves that the imposition of this double liability is an effort to secure a sufficient remedy for this police regulation.

4. This law does not violate section 5, article 9, of the constitution of 1865. This section is intended to direct the disposition of all sums that arise from the various sources mentioned, and which reach the public treasury; and having once been paid into the treasury as the net proceeds of a fine, penalty or forfeiture, this section forbids their use for any other purpose, or their application to any other fund than a public school fund. It still leaves to the Legislature its discretion as to remedies, and does not prescribe that it shall adopt any certain remedy. It means if the Legislature, in its discretion, enacts that a penalty shall be paid to the public, then such penalty, when so paid, shall become part of a certain fund.

5. The record shows that a statement was filed with the justice of the peace, that the statement was read to the jury, and offered in evidence in the circuit court. If it was regular, the circuit court acquired jurisdiction upon receipt of the case from the justice. It will not be presumed that the statement was insufficient, for that would be to presume error. When a court has jurisdiction of the subject matter, the propriety and regularity of its action will be presumed until the contrary appears. *Freeman on Judgs.*, § 124; *State v. Weatherby*, 45 Mo. 17; *Huxley v. Harrold*, 62 Mo. 516.

6. This objection, not having been raised below, cannot be urged here on appeal. *Woods v. Mosier*, 22 Mo. 335; *Kennayde v. P. R. R.*, 45 Mo. 255; *Hause v. Carroll*, 37 Mo. 579; *Beard v. Parks*, 44 Mo. 244.

HOUGH, J.—This was an action under the 43d section of the railroad act for double-damages for stock killed in consequence of the failure of the railroad company to erect

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and maintain fences as provided by law. The plaintiff had judgment and the defendant has appealed.

The defendant contends that so much of the 43d section as entitles the plaintiff to double-damages is unconstitutional, whether the statute be considered as compensatory or penal in its nature. If it be regarded as compensatory only, it is argued that it is unconstitutional, in that it gives the party injured twice the amount of all damages sustained by him, and thus transfers the property of one man to another as a gratuity, and not in the redress of any injury. If it be penal, it is claimed that it is unconstitutional, in that the penalty is given to the person injured, and not to the school fund.

It is manifest that if this statute can be maintained at all, it must be maintained upon the ground that it is a penal statute. Parties civilly injured are by way of recompense, entitled only to full and adequate compensation for all the damages sustained by them, and an act of the Legislature which should provide that in all civil actions the plaintiff should recover twice the amount of the damages actually sustained by him, would undoubtedly be declared to be unconstitutional and void.

The statute under consideration is unquestionably a penal statute. It was so regarded by this court in the case of *Gorman v. Pacific R. R.*, 26 Mo. 450, when single-damages only were recoverable under its provisions. In *Trice v. Hann. & St. Jo. R. R.*, 49 Mo. 440, it was said "while the protection of property of adjacent proprietors is an incidental object of the statute, its main and leading one is the protection of the traveling public. To insure such protection railroads are imperatively required to fence their tracks, and the penal liability deemed necessary to enforce this requirement, is a matter of legislative discretion." A critical examination of the case of *Hudson v. St. Louis, Kansas City & Northern Ry.*, 53 Mo. 536, will show that the sum to be recovered under this section was there regarded

1. RAILROAD DOUBLE DAMAGE LAW: it is penal and not unconstitutional



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as a penalty. The same may be said of the cases of *Seaton v. Chicago, Rock Island & Pacific R. R. Co.*, 55 Mo. 416, and *Parish v. Missouri, Kansas & Texas Ry.*, 63 Mo. 286. In the last two cases it is true it was said that the statute was both penal and compensatory; but it is evident that the word compensatory was only used to convey the idea that the party aggrieved was the person authorized to sue for and recover the penalty, and thus receive compensation for his loss. The act in question was chiefly intended for the protection of persons who are transported in railway carriages, and similar enactments have repeatedly been held to be a proper exercise of the police power of the State. *Cooley's Con. Lim.*, 578, and authorities cited. Being a penal statute, in the absence of any constitutional restriction, the Legislature may lawfully make such disposition of the penalty imposed by it, as will, in its discretion, best subserve the purpose of the enactment. Instead of giving the whole of the penalty to the State, or the county, or of dividing the penalty and providing for a *qui tam* action, the whole of the penalty is given to the party aggrieved, and the method adopted is doubtless a most efficient one for enforcing the statute.

It is said, however, that the 5th section of article 9, of the constitution of 1865, and the 8th section of the 11th article of the constitution of 1875, prohibit the appropriation of this penalty to private uses, by requiring that all penalties shall go to the school fund. The section cited from the constitution of 1865 provides that "the net proceeds of all sales of lands and other property and effects that may accrue to the State by escheat, \* \* \* or from fines, penalties and forfeitures, shall be securely invested and sacredly preserved as a public school fund, and faithfully appropriated for establishing and maintaining free schools and the university." The enactment of penal laws and the imposition of penalties for their violation, is a matter which the constitution has left to the Legislature, and the constitution does not provide that all penalties im-



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posed shall accrue to the State, nor that any shall so accrue; that matter has likewise been left to the Legislature. Such penalties only as the Legislature provides shall accrue to the State, are to go to the school fund under the constitution of 1865.

The language of the constitution of 1875 is slightly variant from that of 1865, but its purport, we think, is substantially the same. It is as follows: “\* \* \*

The clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State, \* \* \* shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund.” Penalties, forfeitures and fines collected in the several counties—that is, collected by the county authorities for the benefit of the county or the State. This section clearly refers to penalties accruing to the public, and not to penalties recovered by private persons for their own use.

Since 1855 we have had a statute requiring that “all fines and penalties imposed, and all forfeitures incurred in any county, shall be paid into the treasury thereof for the benefit of the school fund of said county.” Rev. Stat. 1855, p. 452; Rev. Stat. 1865, p. 867. The statute of 1845 was substantially the same, Rev. Stat. 1845, p. 251. Since 1835 the general revenue law has contained a provision requiring the sheriffs of the several counties to collect and account for all the fines, penalties, forfeitures, and other sums of money accruing to the State or county in virtue of any order, judgment or decree of a court of record. These provisions were on the statute book when the constitution of 1875 was framed and adopted, and the section of that constitution above cited clearly refers to these statutes, and will embrace such others of a similar character as the Legislature may hereafter enact. That the statutes cited only include penalties accruing to the public, is too plain for argument.

The case of *Atchison & Nebraska R. R. v. Baty*, decided

Barnett v. Atlantic & Pacific Railroad Company.

by the Supreme Court of Nebraska at its October term, 1877, we do not conceive to be in point. The statute passed upon in that case is not like ours, but gave the owner of live stock killed on the railroad track double its value, unless the value was paid within thirty days after demand made on the company therefor. There the double-damages were given, not for the violation of any criminal or penal statute passed by the Legislature in the exercise of its police power, but as a penalty imposed upon the defendant in its character as a private person for delay in making payment after demand made, and the law was, therefore, declared to be partial and void. It was also said to be in conflict with a constitutional provision in relation to fines and penalties.

The judgment in this case must be reversed, however, for another reason. The transcript of the justice fails to show that he had jurisdiction of the subject matter of the action, and the statement filed before the justice does not appear in the record. It must appear from the statement filed, or from the justice's transcript, that the stock were killed in the township where the suit was brought. This does not appear, and the question of jurisdiction as to the subject matter may be raised for the first time in this court. *Haggard v. Atlantic & Pacific R. R.*, 63 Mo. 303; *Iba v. Hannibal & St. Joseph R. R.*, 45 Mo. 469. The judgment must, therefore, be reversed, and as it appears that a statement was filed which is not before us, we will remand the cause. All concur.

REVERSED.

THE STATE, *Appellant*, v. LINTHICUM.

1. **Sending Threatening Letter.** Upon an indictment for sending a threatening letter, parol evidence is admissible to explain the meaning of the letter, if the language is ambiguous.
2. **Sending letter Threatening Criminal Accusation.** Under Wagner's Statutes, section 24, page 256, it is an offense to send a letter threatening to accuse one of any crime, a misdemeanor as well as a felony. The word "crime," as there used, has the signification fixed by Wagner's Statutes, section 36, page 516, and is not to be taken as limited or explained by the words "or felony" used in connection with it.

*Appeal from Harrison Circuit Court.*—HON. S. A. RICHARDSON, Judge.

Indictment for sending a threatening letter. The statute makes it a felony to send a letter "threatening therein to accuse any person of any crime or felony whatever." The letter was as follows :

"W. B. PIPER—*Dear Sir*: To make things satisfactory between you and me there are some old matters that must be settled, as we cannot get along as we should. That matter of McLay's and that matter in which you and me had a suit once, in which you was the cause of me paying \$15.75 costs, besides about \$10 to start with, making \$25.75 besides the McLay amount.

"PIPER: I have at no time ever aimed to misuse you or to speak disrespectful of you, but on the contrary I think you have both with me, and if you expect to have anything more to do with me you must fix this matter satisfactory. It is a well settled fact that I never forget anything of this kind, and never forgive unless the circumstances require it, which is not the case in this. If you think that \$25.75, and settle that McLay matter, would be any easier done than to pay five times \$40, and probable cost, you probably had better see to it. I don't wish to do anything more than I ought, but I might do even more than this. Don't know as I can do so, but if you want to

pay me said amount you can do so, if not just let it alone."

The defendant moved to quash the indictment, because it did not set forth, by proper innuendo, the meaning of the different passages of the letter, because the letter did not contain any threat to accuse any one of any crime or felony whatever, nor indicate any intent or view to extort or gain any money or property belonging to another, because the indictment did not charge that the defendant threatened to accuse any one of a felony, nor of such infamous crime as would be calculated to put a man of ordinary firmness in fear nor of an offense that is both a crime and a felony.

This motion was sustained by the court, whereupon the State appealed.

*J. L. Smith*, Attorney-General, for the State.

*Shanklin, Lowe & McDougal*, with whom were *Alvord & Fawcett* for respondent.

HENRY, J.—The indictment specifically charges that by the letter, the defendant threatened to accuse Wm. B. Piper of the crime of selling intoxicating liquors without having a license. The language of the letter is ambiguous, but parol evidence is admissible to explain its contents. *People v. Braman*, 30 Mich. 463, and cases there cited. Whether it contained the threat alleged was a question for the jury. If it had been written in cipher, we presume that evidence to prove the signification of the characters employed would have been admissible. A contrary doctrine would enable one to violate the statute with impunity, by making his threats in such manner, that however well understood by the parties, other evidence would be necessary to make apparent to other persons what was intended.

It is contended, for defendant, that the words "or felony" in Wag. Stat., sec. 24, p. 456, limit and explain the

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The State v. Linthicum.

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2. SENDING LETTER  
THREATENING  
CRIMINAL ACCUSA-  
TION.

word "crime" with which they are connected, and that the phrase means any crime which is a felony, and that the crime for which it is alleged the defendant threatened to prosecute Piper, being only a misdemeanor, the indictment was properly quashed. Wag. Stat., sec. 36, p. 516, declares that "the terms 'crime,' 'offense' and 'criminal offense,' when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may, by law, be inflicted." This section is to be found in the statute in relation to crimes and punishments, as is also that section which makes the crime for which defendant was indicted a felony. The latter precedes the former in the statute, and we presume that the Legislature, in passing the 36th section, had not forgotten that the 24th had been enacted.

If, as contended by respondent, these words "crime" and "felony" in section 24 mean the same thing, the Legislature committed a singular blunder in defining the meaning of the word crime in one section of the statute, and employing the same word in another section of the same statute in a different sense, without any indication whatever that it was used in a sense different from that which was attached to it in the section expressly defining it. While all felonies are crimes, all crimes are not felonies, hence, if as we think clear, the Legislature intended to make the offense of sending a letter threatening to accuse one of a misdemeanor only, a felony, it was absolutely necessary to employ the word crime or some other appropriate word to embrace that class of offenses. The word felony might have been omitted because the word "crime" embraces all felonies, but that superfluity would not be any more open to criticism than the tautology would be, if the terms "crime" and "felony" in the section mean the same thing. In either case we have superfluous words. The language of the 36 section is conclusive, that

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the position taken by respondent's counsel is wholly untenable.

The judgment of the circuit court is reversed and cause remanded. All concurring.

REMANDED.

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BRADLEY V. WEST, *Appellant*.

1. **Former Recovery of part of a Tract, as Evidence of right to the whole.** A verdict and judgment of restitution in an action of forcible entry and detainer for a tract of land, part of a larger tract, all of which is claimed by defendant under the same alleged title, is, in a subsequent action of ejectment between the same parties, conclusive upon the question of the right of possession at the date of the forcible entry, not only as to the tract actually detained by defendant but as to the whole; and when restitution has been made under the judgment, the *statu quo* is restored, and the defendant's possession of the smaller tract becomes from the beginning the plaintiff's possession, and all constructive possession arising out of defendant's actual possession under color of title, is thereby extinguished.
2. **Witness, other party dead.** The fact that the grantor is dead does not make the grantee incompetent to testify in relation to the execution of a deed, when the question arises in a suit between the grantee and a stranger to the deed.

*Appeal from Carroll Circuit Court.*—HON. E. J. BROADDUS,  
Judge.

L. H. Waters for appellant.

1. Horton being dead, plaintiff, who was his grantee, was not competent to testify to the execution of the deed, nor to explain the erasures and interlineations. *Poe v. Domic*, 54 Mo. 119; *Johnson v. Quarles*, 46 Mo. 423. 2. This action was brought to recover the southeast quarter of section 15, 55 north, 23 west, on the 28th day of February, 1872, almost three years after defendant went into posses-



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sion. The action for forcible entry, the court will see from the record, was commenced August 1st, 1871, for the twelve acres off of the east side of the same tract. The judgment in the latter case, in effect, is for a different tract of land. The forcible entry on plaintiff's possession was the foundation of his right to recover, while in the former case defendant's entry, forcible though it may have been, if with intent to claim the land, is the foundation of an adverse possession; and if the possession taken thereunder was continued in good faith for the statutory period, then plaintiff was barred. And the good faith goes to the intent to claim and possess the land. *Bradley v. West*, 60 Mo. 41; Washb. Real Prop., 125. While the plaintiff, under the ruling of this court in *Bradley v. West*, 60 Mo. 59, might have recovered the whole tract in an action for forcible entry, yet, as he did not bring that action for the land in controversy, the forcible entry, will, as to this case, avail him nothing.

*Botsford & Williams* with *Thomas J. Whiteman* for respondent.

1. The plaintiff was competent to testify touching the execution of the deed. 2 Wag. Stat., § 1, p. 1372; *Morse v. Low*, 44 Vt. 561; *Manufacturers' Bank v. Schofield*, 39 Vt. 594; *Looker v. Davis*, 47 Mo. 145; *Angell v. Hester*, 64 Mo. 142; *Isenhour v. Isenhour*, 64 N. C. 640; *Downs v. Belden*, 46 Vt. 674. 2. The question of prior possession is conclusively settled by the record of the proceedings in the forcible entry and detainer case. The question necessarily and directly in issue in that action was whether respondent, the claimant therein, was in the actual and peaceable possession of the tract including the strip of twelve acres on the day of the alleged unlawful and forcible entry. To recover in that action it was incumbent on the complainant to show that he was in the actual and peaceable possession of the premises claimed, and that defendant

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entered upon that possession and ousted him. *Bell v. Cowan*, 34 Mo. 251; *Beeler v. Cardwell*, 29 Mo. 72; *Prewitt v. Burnett*, 46 Mo. 372; *Bradley v. West*, 60 Mo. 62. This record was admissible in the present suit, for the purpose of showing such adjudication. *McKnight v. Taylor*, 1 Mo. 282; *Offutt v. John*, 8 Mo. 124; *Harvie v. Turner*, 46 Mo. 444; *Ridgley v. Stillwell*, 27 Mo. 128; *Strong v. Ins. Co.*, 62 Mo. 295; *Wood v. Ensel*, 63 Mo. 194; 2 Wharton Ev., § 758; *Mitchell v. Davis*, 23 Cal. 381; *Stean v. Anderson*, 4 Harring. (Del.) 215. The judgment of a court of competent jurisdiction, directly upon a particular point, is, between the parties, conclusive in relation to such point, though the purpose of such suits be different. *Transportation Co. v. Traube*, 59 Mo. 362; *Spencer v. Dearth*, 43 Vt. 98; *White v. Coatsworth*, 6 N. Y. 138; *Freeman on Judgts.*, § 253.

HOUGH, J.—This was an action of ejectment instituted March 1st, 1872, to recover the possession of a part of the southeast quarter of section 15, township 55, range 23, the same being military bounty land in the county of Carroll. The cause was tried at the December term, 1875. The defendant relied upon adverse possession under color of title for the period of two years, under the special limitation law applicable to such lands. The plaintiff had judgment and the defendant has appealed.

It appears from the record that the plaintiff and the defendant each had actual possession in April, 1869, of a part of the tract in controversy; the plaintiff of a strip on the west side of said tract containing about eight acres, and the defendant of a strip on the east side thereof containing about twelve acres. The intervening portion of the tract remained unoccupied until the summer of 1871, when the defendant took actual possession of a part and subsequently of the whole thereof. On the 22d day of June, 1871, plaintiff brought an action of forcible entry and detainer against

1. FORMER RECOVERY OF A PART OF A TRACT, AS EVIDENCE OF RIGHT TO THE WHOLE.

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the defendant for the twelve acres occupied by him, and recovered judgment therefor, which judgment was affirmed by this court at its May term, 1875. 60 Mo. 59. A writ of restitution was issued on this judgment and the plaintiff was restored to the possession of said twelve acres on the 11th day of November, 1875. The only possession claimed by the defendant of the land lying between the eight acres on the west and the twelve acres on the east, prior to the summer of 1871, was a constructive possession thereof by reason of his alleged occupation of the twelve acres under color of title before the plaintiff, or any one for him, entered upon the western border of the tract. But the verdict of the jury in the forcible entry and detainer case is conclusive of the fact that the plaintiff entered upon the western border of the tract before defendant entered upon the eastern border, and that the latter's entry was a forcible intrusion upon the plaintiff's possession, and when restitution was made under the judgment in that case the *statu quo* was restored, and the defendant's possession of the twelve acres, became, from the beginning, the possession of the plaintiff and all constructive possession arising out of the actual possession, under color of title, was thereby extinguished. *Ferguson v. Bartholomew*, 67 Mo. 212. The only adverse possession, therefore, which the defendant could rely upon, was the possession taken by him in the summer of 1871, and that was less than two years before the institution of the present suit.

As to the deed from Horton to the plaintiff, we are of opinion that the plaintiff was a competent witness to prove that the grantor's name was in the body of the deed and in the certificate of acknowledgment at the time such certificate was given by the justice, though Horton, the grantor, was dead. The deed from Horton to plaintiff was not the contract or cause of action in issue and on trial. The cause of action in issue and on trial was the alleged unlawful withholding, by the defendant, of the possession of certain lands from the

2. WITNESS, OTHER  
PARTY DEAD.

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plaintiff, and both of the parties to this controversy are living. The case does not come, therefore, within the letter of the statute; nor does it come within the reason of the statute, as the representatives of Horton are not parties to this suit and cannot be affected by the result thereof. The validity of the deed from Horton to the plaintiff arises incidentally, and is not directly and necessarily involved in the issues to be tried. "By the words 'contract or cause of action in issue and on trial,' as used in the statute, the Legislature evidently intended such contract or cause of action as was to be enforced by the proceeding; that in regard to which an issue was to be formed and a trial had, where the rights of the parties to the contract or cause of action would be determined by the result." *Manufacturers' Bank v. Schofield*, 39 Vt. 590, 594. In *Downs v. Belden*, 46 Vt. 674, it was held that where A sued B in trover for the conversion of property which A bought of C, who was dead, A was a competent witness in his own behalf as to his contract of purchase with C. In *Granger v. Bassett*, 98 Mass. 462, speaking of the cases in which a party may be a witness under a statute like ours, the court said: "His competency must be determined in advance by the nature of the controversy and the question in issue. If, upon that test, he is admitted as a witness in the case, his testimony is competent for all purposes, although it may relate to transactions with a person since deceased, which prove to be involved in or to affect the matter in dispute." The case of *Looker v. Davis*, 47 Mo. 141, is to the same effect. We think the rule enunciated in these cases the correct one. It follows that the plaintiff was a competent witness. In *Poe v. Domic et al.*, 54 Mo. 119, and *Johnson v. Quarles et al.* 46 Mo. 423, the transactions in reference to which testimony was excluded on the ground that one of the parties thereto was dead, were brought directly in issue by the pleadings. In *Angell v. Hester*, 64 Mo. 142, a promissory note made by the defendant, was the contract in issue and on trial, and the defendant

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was offered, as a witness, to vary his liability thereunder, by reason of a transaction had with the other party to said contract, who was dead. We held that he was properly excluded. We see no error in the record, and the judgment will be affirmed. All concur.

AFFIRMED.

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GRAVES V. COCHRAN, *Appellant*.

1. **Homestead and Dower:** DOWER, HOW COMPUTED: NORTHAMPTON TABLES. When land, in which a widow has a homestead right, has been sold for purposes of partition, she is entitled, under section 6 of the homestead law, (Wag. Stat., p. 698,) to receive out of the proceeds of the sale, first, the value of her homestead. If this equals or exceeds one-third of the whole estate, she will receive nothing further; but if it is less than one-third she will receive in addition, by way of dower, an annuity upon an amount sufficient to make the aggregate equal to one-third. In order to ascertain the present value of her interest in that sum, the Northampton tables might be used.
2. **Dower not to be Diminished by Taxes.** The amount allowed a widow for her dower out of the proceeds of the sale of the estate of her deceased husband, is not to be diminished by the taxes, or any portion of the taxes assessed against the land either in her husband's life-time or during her quarantine.

*Appeal from Boone Circuit Court.*—HON. G. H. BURCKHARTT, Judge.

This was a suit for partition of a tract of land in Boone county, belonging to the estate of William Cochran, deceased. Defendant was widow of deceased, and the premises in question had been their homestead. Being found not to be susceptible of partition in kind, the property was sold by order of the court, bringing \$7,900. Defendant, thereupon, moved the court to order the payment of \$1,500 to her in lieu of her homestead right in the land, and that she be adjudged endowed of the residue of the

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purchase money as if the same were land, that is, that \$1,133.33 be set apart for her use during her natural life, or that the commuted value thereof be paid to her in cash. Upon the hearing of this motion the defendant prayed the court to declare the law to be as follows: "Defendant, as widow, is entitled to have set off to her as, and for her homestead, and in lieu thereof, \$1,500 out of the money derived from the sale of her deceased husband's lands—and she is also entitled to dower out of the residue of the net proceeds of such sale, provided, that said homestead (in money) does not exceed one-third part of the whole net proceeds of the sale of said lands, and if dower so estimated out of the proceeds is commuted into so much money, it should be done by calculating the present value of what would be the amount of interest at six per cent. on the principal, derived by deducting the \$1,500 homestead from the net third of the proceeds of sale."

The court refused this prayer, and made the following declaration of law: "The dower interest in the money realized from the sale of the real estate after deducting therefrom all costs, and after deducting her homestead interest therein, should be ascertained, commuted and paid to defendant, provided her said homestead should not exceed her dower interest, and this to be determined by ascertaining the present value of one-third of the net proceeds of the sale on the basis of calculation fixed by the so-called Northampton Annuity Tables."

The court then found that the dower of defendant did not exceed the homestead, and ordered that she be paid in cash the sum of \$1,500, less the sum of \$326.78, which was admitted to be the amount of the unpaid taxes assessed and levied on all said land since the death of said William Cochran, deceased. It was admitted that all said land was, during that time, occupied by defendant.

*S. Turner and MacFarlane & Trimble* for appellant.



*O. Guitar* for respondent.

HENRY, J.—This case involves a construction of the homestead act in connection with that in relation to dower.

1. HOMESTEAD AND  
DOWER: dower,  
how computed:  
Northampton ta-  
bles.

Before the passage of the homestead act, the widow was entitled to be endowed of the third part of all the lands whereof her husband was seized of an inheritance, and in partition proceedings, if it became necessary to sell the land, she was entitled to an annuity equivalent to one-third of the proceeds of the sale during her life. Wag. Stat., § 31, p. 544; § 39, p. 978. The first section of the homestead act gives to every housekeeper, or head of a family, a homestead not exceeding, in the country, 160 acres of land, or the total value of \$1,500. By section 6 it is provided that: "The commissioners appointed to set out such homestead, shall, in cases in which a right of dower shall also exist, also set out such dower; and they shall first set out such homestead, and from the residue of the real estate of the deceased, shall set out such dower, but the amount of such dower shall be diminished by the amount of the interest of such widow in such homestead; and if the interest of such widow in such homestead shall equal or exceed one-third of the real estate of which such housekeeper, or head of a family, shall have died seized, no dower shall be assigned to the widow." The dower is diminished by the amount of the interest of the widow in the homestead—diminished by something taken from it—by the amount of what is so taken from it. The dower was one-third, but the homestead has been taken from it, and the balance, after deducting the homestead interest, is what she is entitled to as dower. If the homestead interest equal or exceed the dower interest, it is taken by her in lieu of dower; if less than her dower interest, she is to receive, in addition, of the real estate, or if sold, of its proceeds, a sufficient amount to make up what she is entitled to as dowress.

After setting apart the homestead, if it be less than the dower interest, the balance of her dower is to be set out from the residue of the real estate. The whole estate is the basis for the ascertainment of her dower, whether there be a homestead interest or not, while from the residue, after the assignment of the homestead, when such a right exists, the balance is to be set out. Here the land was sold, and the widow was entitled to \$1,500 for her homestead, and in addition, such annuity as would make the aggregate equal one-third of the proceeds of sale. Wag. Stat., sec. 39, p. 972, directing, that when the land is sold, the present value of the dower interest is to be paid to the widow, has no application whatever to a homestead right, but only to the dower interest, in this case the balance after deducting the homestead interest, and the Northampton tables might be used to compute the value of that balance.

Nor is the dower interest of the widow to be diminished by the taxes, or any portion of the taxes assessed against the land, either in her husband's lifetime or during her quarantine. *Moore v. White*, 61 Mo. 442. Section 21 of the dower act provides that: "Until dower be assigned, the widow may remain in and enjoy the mansion house of her husband, and the messuages or plantation thereto belonging, without being liable to pay any rent for the same." It is the duty of the heirs to assign her dower, and section 21 is but a provision for her until that duty shall have been complied with by them. The judgment of the circuit court is reversed and the cause remanded, to be proceeded with in conformity to this opinion. All concur.

REVERSED.

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The State v. Bench.

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THE STATE, *Appellant*, v. BENCH.

**Indictment for Larceny of Township Property :** DEMURRER. An indictment charged the defendant with stealing certain lumber, "the property of Blue Mound township, Livingston county." At the time of the alleged larceny, the township organization law (Acts 1873, p. 97) was in force, and authorized any county to adopt township organization upon a majority vote of the qualified voters. It provided that in counties adopting the law, each township, as a body corporate, should have power to purchase and hold such property, and so much thereof as might be necessary to the exercise of its corporate or administrative powers. In counties not so organized, townships had no such power. The indictment having been demurred to as insufficient because Blue Mound township could not be the owner of the property; *Held*, that whether it could or not, depended on two facts, 1st, Whether Livingston county had adopted township organization; 2d, Whether the property alleged to have been stolen was necessary to the exercise of the corporate powers of the township; and these could only be determined by a trial. Hence the demurrer should have been overruled.

*Semble*, that no averment of these facts in the indictment was necessary.

*Appeal from Livingston Circuit Court.*—HON. E. J. BROADDUS, Judge.

*J. L. Smith*, Attorney-General, for the State.

*Davis & Wait* for respondent.

1. Each township in counties having adopted township organization, has the power to purchase and hold such personal property as may be necessary to the exercise of its corporate and administrative powers and no other. This is a limited power, a prescribed power, and the indictment must show that the property alleged to have been stolen was property which the township could hold and own. Exceptions in the enacting clause must be negatived in an indictment, and the same rule must apply when limited powers are possessed. *State v. Shiflett*, 20 Mo. 415; *State v. Sutton*, 24 Mo. 377; *State v. Cox*, 32 Mo. 566. 2. Town-

ships of counties not having adopted township organization have no legal corporate existence enabling them to hold any property, and no allegation is made in the indictment that Livingston county had ever adopted township organization. A court will take judicial notice of the adoption of township organization in its own counties as a matter of law, but not as a matter of pleading, any more than they would if an indictment commenced in the name of a county with no State, either in the caption or body of it.

NORTON, J.—Defendant was indicted in the Livingston circuit court, at its September term, 1877, charged with grand larceny in feloniously taking, stealing and carrying away three pieces of pine lumber, of the value of \$11.50, "then and there the property of another, to-wit: the property of Blue Mound township, Livingston county." A demurrer was filed by the defendant to the indictment, which was sustained, and from this action of the court the State has appealed to this court. It is contended by defendant that the indictment is insufficient, because Blue Mound township, the alleged owner of the things charged to have been stolen, cannot, under the law, be the owner of property, and because it does not allege that said township is in Livingston county, Mo.

In 1873, the General Assembly adopted a "township organization" law, (Acts 1873, p. 97,) in which it is provided that it should be operative in any county when adopted by a majority of the qualified voters of such county at any general election. It is therein provided that in counties adopting the law, each township, as a body corporate, shall have power and capacity "to make such contracts, purchase and hold property, and so much thereof as may be necessary to the exercise of its corporate or administrative powers." While we may not take judicial notice of the fact that Livingston county adopted this law, we will take notice that it had the right to do so, and as to whether it did or not is a question of fact to be investigated on the

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trial, as well as the question whether such property as is alleged to have been stolen, was necessary to the exercise of its corporate powers. The right of Blue Mound township under the act of 1873, *supra*, to hold property, was dependent upon two facts: one being the adoption by Livingston county of the township organization, as prescribed by the law, the other whether the property in question was necessary to the exercise of its corporate powers. Both of these being questions of fact, should have been determined on a trial of the cause, and not on demurrer. *State v. Cunningham*, 51 Mo 479.

The objection that the township (though charged to be in Livingston county, the venue of which was laid in a preceding part of the indictment) is not alleged to be in Livingston county, Missouri, is of a character so technical as to make its consideration unnecessary under Wag. Stat., sec. 27, p. 1090.

Judgment reversed and cause remanded, in which the other judges concur.

REVERSED.

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HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant*, v.  
CRAWFORD.

**Fence-rails, when part of the Freehold:** SALE: TRESPASS: TREBLE-DAMAGES. A person in possession of land under a contract of purchase, by the terms of which it is provided that a failure to pay at the time agreed upon shall work a complete forfeiture of his interest, has no right, after default made, to sell the fence-rails used to inclose the premises. The fence constitutes part of the freehold, and the fact that the rails may at the time be accidentally or temporarily detached from it, does not change their nature. A sale under such circumstances carries no title, and if the purchaser removes them, he becomes liable as a trespasser, but not necessarily in treble-damages.

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Hannibal & St. Joseph Railroad Company v. Crawford.

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*Appeal from Shelby Circuit Court.*—HON. JOHN T. REDD,  
Judge.

*George W. Easley* for appellant.

HOUGH, J.—This was an action of trespass, under the statute, for treble-damages for removing rails.

On the 1st day of May, 1872, the plaintiff contracted in writing with one Lewis E. Miles for the sale of the land described in the petition, for the sum of \$320, payable in ten annual installments. In January 1873, Miles entered into possession under the contract, and built a fence with rails made from timber growing on the land. He made default in the payment of the installment due on May 1st, 1873, and in November, 1873, he sold the rails to defendant, who hauled them away, and in December following he left the premises. Plaintiff instituted the present action on the 13th day of January, 1874. The court virtually instructed the jury that the plaintiff could not recover. Plaintiff, thereupon, took a non-suit with leave to move to set the same aside, and has brought the case here by appeal. (By the terms of the contract of sale under which Miles entered into possession of the land sold, time was declared to be of the essence of the contract, and a failure on his part to punctually pay each annual installment of the purchase money as it became due, worked a forfeiture of the contract. It was further provided in said contract that, in the event of the default of Miles in making payment "the right of possession and all equitable and legal interests in the premises" contracted for, were to revert to and revest in the plaintiff, "without any declaration of forfeiture, or act of re-entry, or any other act of said first party, and without any right of said second party of reclamation or compensation for moneys paid or services performed, as absolutely, fully and perfectly as if this contract had never been made." There is no question of waiver in this case. No act was done by the plaintiff



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after the default and forfeiture of Miles, recognizing or restoring his rights as vendee, and although he remained in possession of the land, he had no rights therein which he could transfer to the defendant. The fence was a part of the freehold, and the fact which was alluded to in one of the instructions given by the court that the materials of which it was composed were accidentally or temporarily detached, worked no change in their nature. *Goodrich v. Jones*, 2 Hill 142; *Walker v. Sherman*, 20 Wmd. 639; *Climmer v. Wallace*, 28 Mo. 556. The defendant acquired no right by his purchase, and is liable as a trespasser for removing the rails, but on the facts now before us, we do not think he is liable for treble-damages. The judgment is reversed and the cause remanded. All concur.

REVERSED.

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THE STATE V. BECKWORTH, *Plaintiff in Error*.

**Indictment for Burglary with intent to Steal.** An indictment under Wag. Stat., sec. 16, p. 455, charged that the defendant had committed burglary with intent to steal, and that he had stolen certain goods, but failed to state their value. The jury found him guilty of both burglary and larceny, but the court sentenced him only for the burglary. On appeal from this judgment, *Held*, that the indictment was sufficient to sustain it; it was not necessary to state the value of the goods stolen.

*Error to Daviess Circuit Court.*—HON. S. A. RICHARDSON, Judge.

Indictment, under Wag. Stat., sec. 16, p. 455. The charge was that "on, &c., at, &c., Charles Beckworth did feloniously and burglariously break into and enter the mill-house of Isaiah H. Jones, the same being then and there a building in which divers goods, wares and merchandise,

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and other valuable things were then and there kept and deposited, with the intent, then and there, feloniously and burglariously to take, steal and carry away some of the goods then and there being in said mill; and 250 pounds of wheat flour, of the personal goods of Isaiah H. Jones, then and there in said mill being found, feloniously and burglariously, did steal, take and carry away, against, &c." Defendant contended that the indictment was insufficient because it failed to state the value of the goods stolen.

*J. F. Hicklin* and *Wm. B. Hamilton* for plaintiff in error.

*J. L. Smith*, Attorney-General, for the State.

NAPTON, J.—This was an indictment against Beckworth for burglary and larceny. The indictment did not state the value of the goods alleged to have been stolen in the perpetration of the burglary. The jury found the defendant guilty of both burglary and larceny, and assessed his punishment for the former at three years in the penitentiary, and for the latter two years. The court, however, only sentenced him to three years imprisonment.

When a larceny is committed in the perpetration of a burglary, as is alleged in this indictment, the amount of the property stolen is unimportant, and under our statute, (Wag. Stat., § 19, p. 455,) the punishment may be increased, if the jury convict of both. The jury may find the defendant guilty of burglary and not of larceny; but under such an indictment, could not find him guilty of larceny and not of burglary, for the plain reason that the larceny charged was in the commission of a burglary. That the defendant, under the present indictment, could not be found guilty of larceny and at the same time be acquitted of burglary, could not surely be a matter of complaint with him. In other words, we are unable to see why he should complain for not being indicted for an

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offense of which he was not guilty. Judgment affirmed. The other judges concur.

AFFIRMED.

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HOUX V. BATTEEN, *Appellant*.

1. **Deed: SIGNATURE IN WRONG NAME: CERTIFICATE OF ACKNOWLEDGMENT.** An instrument which purports in the body of it to be the deed of Henry Trigler, and which has appended to it a certificate of a justice of the peace, in due form of law, that Henry Trigler had acknowledged it to be his act and deed, is admissible in evidence as the deed of Henry Trigler, notwithstanding it is signed "Henry Trigg;" but if the certificate is defective, it will not cure the defect in the deed, and the deed will not be admissible.
2. **Statute of Limitations.** Exclusive, peaceable and uninterrupted possession of a tract of land under color of title for a period of forty-five years, is sufficient to sustain an action of ejectment. *Merchants' Bank v. Evans*, 51 Mo. 335.
3. — : **POSSESSION UNDER A MISTAKE OF LINES.** Possession by adjoining proprietors of land up to what they both erroneously suppose to be the true dividing line between them, with no intention on the part of either to claim beyond the true line, will not work a disseizin in favor of either of any land so erroneously occupied by him. *Tamm v. Kellogg*, 49 Mo. 118.
4. **Instructions.** If the only error in an instruction is that it requires one of the parties to prove more than he ought to be required to prove in order to make out his case, the adverse party cannot complain.
5. **Evidence of Unauthorized Survey.** A witness will not be allowed to testify how another person, who was neither a county surveyor nor a deputy county surveyor, nor acting under the authority of the United States, nor by consent of the parties to the suit, had made a survey of the premises in controversy, nor what the results were. Under Wag. Stat., sec. 11, p. 1308, the survey itself, if offered in evidence, would be inadmissible. But the witness will be permitted to testify to everything that he may know about corners, lines and monuments from having been present and assisted in making the survey.

*Appeal from Lafayette Circuit Court*—HON. WM. T. WOOD,  
Judge.

*H. C. Wallace* for appellant.

*Geo. S. Rathbun* for respondent.

HENRY, J.—The plaintiff, respondent, in July, 1875, instituted a suit in ejectment against the defendant, in the circuit court of Lafayette county, to recover a strip of land in the north part of the northwest quarter of section 6, town. 49, range 18, in said county, "being a strip across the north side, 470 links wide on the west side, and 235 links on the east side, containing about 15 acres." The answer denied plaintiff's title, and also that defendant, on the 1st day of March, 1871, or at any other time, took possession as alleged in the petition. The cause was tried by the court without the intervention of a jury, and there was a judgment in favor of plaintiff, from which defendant has duly prosecuted an appeal.

The evidence on the part of plaintiff was an entry of the northwest quarter of section 6, town. 49, range 28, by Henry Trigler on the 4th day of February, 1825. 2nd. The record of a deed from Henry Trigler to Peter Purvant, dated 4th day of January, 1828, conveying "85 acres, it being the one-half of the northwest quarter of section 6, in township 49, of range 28." The deed was signed "Henry Trigle." To this deed was attached the certificate of W. Y. C. Ewing, a justice of the peace, "that Henry Trigler, whose name is subscribed to the within deed, is personally known to me as having executed the same before me." Defendant objected to the admission of the deed as evidence, because the description of the land was uncertain and the acknowledgment defective, but the court overruled the objection.

Plaintiff then offered the record of a deed from said Henry Trigler to Jessie Hitchcock, dated the 6th day of March, 1829, conveying to the said Hitchcock "all the grantor's right and title to, and interest in, the following described tract or parcel of land lying in the county of La-

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fayette, it being the northwest quarter and west half of section 6, township 49, range 28, containing by estimation 85 acres, more or less." This deed was signed "Henry Trigtt," and to it was appended a certificate of W. Y. C. Ewing, that on the 26th day of March, 1829, Henry Trigler, who was personally known to him to be the person whose name was subscribed to the foregoing instrument of writing as having executed the same, acknowledged the same to be his act and deed, &c. To the introduction of this deed defendant objected, because it was signed by Henry Trigtt and acknowledged by Henry Trigler. The court overruled the objection.

Plaintiff then read as evidence a deed from Jessie Hitchcock and wife to Peter Purvant, dated 12th day of February, 1830, conveying to the grantee "the west half of the northwest quarter of section 6, township 49, range 28, contraining 85 acres by estimation, more or less." Then followed the record of a deed from said Purvant to Joshua H. Sterne, dated 29th day of January, 1853, conveying to said Sterne the northwest qurter of section 6, township 49, range 28. Next, the record of a deed from said Sterne to Joseph Hassell, dated 7th day of April, 1864, conveying to Hassell the northwest quarter of section 6, township 49, range 28, except four acres off of the southwest corner of said quarter section. Then followed a deed from said Hassell to William Houx, the plaintiff, dated 9th day of February, 1866, conveying the same land conveyed to said Hassell by said Sterne.

The controversy grew out of a misunderstanding as to the location of the northwest corner of said quarter section, plaintiff insisting that the point which defendant, who owned the land north, claimed as the corner was some distance south of the true corner. There was such a conflict of evidence on that issue that we have no disposition to interfere with the finding of the court, and will not disturb the judgment unless the court, in the progress of the trial,

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committed errors materially prejudicing the defendant, and shall proceed to consider the errors assigned.

The first complaint is of the admission of the deed from Henry Trigler to Peter Purvant. The deed was signed by Henry Trigle, and the acknowledgment was so defective that it did not cure the defect in the deed, which should therefore have been excluded. But this error of the court did not prejudice the defendant if the deed from Trigler to Hitchcock was sufficient to convey a title to the land. That deed was signed "Henry Trigtt." In the body of the deed it purported to be the deed of Henry Trigler, and the justice of the peace who took the acknowledgment, certified, in due form of law, that Henry Trigler acknowledged it to be his act and deed, and this we think sufficient.

But if this were not so, Purvant, under the deed from Hitchcock to him, immediately took possession of the west half of the said northwest quarter. The deed was made in 1830, and the plaintiff and those under whom he claims had been in the exclusive, peaceable, uninterrupted possession of said half quarter, under color of title at the commencement of the suit for a period of 45 years, and such possession is sufficient to sustain an action of ejectment. *Merchants Bank v. Evans*, 51 Mo. 335.

Defendant objected to the introduction of the report of the surveyor who was ordered by the court to survey the land in dispute. Without considering in detail the objections to the report, it is sufficient to say that the surveyor was introduced as a witness, and testified to all the facts contained in the report. Nor did the court err in excluding the testimony of the witness Adams as to a survey made by one Tidball in 1869. Tidball was not the county surveyor, and his survey was not made with the consent of the claimant of the land. Wag. Stat. § 11, p. 1308.

The court declared the law for plaintiff as follows;  
1st. That if in this case the plaintiff and defendant have



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claimed, and still claim, to the line which they suppose to be the true line dividing their respective premises, their possession held under mistake or ignorance of the true line, and without intending to claim beyond the true line when discovered, will not and does not work a disseizin in favor of either party.

2nd. If the court find from the testimony that the plaintiff in this case is the owner of the north half of the northwest quarter of section 6, township 49, range 28, as set up in his petition, and that the northwestern corner of said quarter section was established by the government survey within the timber 100 links, and 200 links south of the bend of the Sni-a-bar creek, and northeast of the west end of the lake mentioned and described by the witness, then the line running east from said corner to what is known as the elm corner at the northeast corner of said section 6, constitutes the township line bordering the northern boundary, and is the northern boundary line of said section 6, and the land herein sued for is south of and joining said line, then it is the property of plaintiff, and he is entitled to the possession of the same.

3rd. The land in dispute, to-wit: that part of it which lies on the north end of the west half of said northwest quarter of said section 6, is claimed by the defendant to constitute a part and portion of the southwest quarter of the southwest quarter of section 31, township 50, range 28, and the true location of said land depends upon the location of township line between said two sections 6 and 31, and if the court finds from the evidence, and government surveys and field notes, and from the corners and monuments placed on the range line between ranges 28 and 29, forming the western boundary line of said sections 6 and 31, that said land, or any part thereof, is in the northwest quarter of said section 6, and joining the township line, then the court will find for the plaintiff as to so much thereof as the evidence shows the defendant is in possession of, to-wit: for all that part which lies on the

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north side of the west half of said northwest quarter of said section 6, and for damages for cutting timber, and monthly rents and profits of the same, as the evidence may show the plaintiff is entitled to.

The first instruction is in accord with the decision of

3. — : possession under a mistake of lines. this court in the case of *Tamm v. Kellogg*, 49 Mo. 118.

The second was a little inaccurate in declaring that if the court found from the testimony that plaintiff was owner of the north half of the quarter as set up in his petition, and that the corner was where plaintiff claimed it to be, then the land in dispute was the property of the plaintiff. But the fault of this instruction was that it required more proof of plaintiff than he was required to make to entitle him to recover the parcel of land in controversy. This parcel was on the north end of the west half of the quarter. To the west half of the quarter only we have seen the plaintiff entitled. The instruction, therefore, wherein it was erroneous, could not have injured defendant. It would not have been calculated to mislead a jury if the case had been tried by a jury, and certainly could not in any manner have injuriously affected the defendant addressed to the court, because in the next instruction the court distinctly stated that the land in controversy was on the north end of the west half of the quarter section. The instructions asked by defendant were all given, and those in connection with the instructions for plaintiff fairly and fully declared the law applicable to the case, and the finding of the court as to the location of the corner of the section under the government survey, we think fully warranted by the evidence. All concurring, the judgment is affirmed.

AFFIRMED.

*On Motion for Rehearing.*

The counsel for appellant has placed an erroneous construction upon the opinion of this court, wherein we held

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5. EVIDENCE OF UN-  
AUTHORIZED SUR-  
VEY.

that "in excluding the testimony of the witness Adams, as to a survey made by one Tidball in 1869, the court did not err. Tidball was not county surveyor, and his survey was not made with the consent of the claimant of the land." We might have added that Tidball was not the deputy county surveyor, and that the survey was not made by the authority of the United States. Wag. Stat., sec. 11, p. 1308, provides that no survey or re-survey hereafter made by any person except that of the county surveyor or his deputy, shall be considered as legal evidence in any court in this State, except such as are made by authority of the United States or by mutual consent of the parties. The evidence offered, which was excluded by the court, was that of Adams of a survey made by Tidball of the premises, and corner in dispute in March, 1869, how such survey was made and what the results were, and that said Tidball was a competent surveyor. If the survey of Tidball had been offered in evidence, the court, under the 11th section, would have been bound to exclude it, and yet it is seriously contended and elaborately argued that the contents and results of that survey might be proved by parol evidence. There is not enough plausibility in the argument to require any other answer than a statement of the proposition.

The court did not prevent this witness from telling what he knew about the corners and lines from having assisted as a chain-carrier in the Tidball survey. He was permitted to, and did testify, to all that he knew of the corners and lines and monuments from having been present and assisting in that survey. The argument of the counsel is based upon an inaccurate statement as to what the circuit court ruled, and this court held. The other grounds urged for a re-hearing are equally untenable, and the motion is overruled.

THE STATE V. WHITTON, *Appellant*.

1. **Change of Venue:** POWER OF COURT TO LIMIT NUMBER OF WITNESSES. A trial court has the power in a criminal case, by an order made before-hand, to limit the number of witnesses to be heard in reference to an application for a change of venue. Such a ruling comes within the domain of judicial discretion, and an appellate court will not interfere unless this discretion has been arbitrarily and abusively exercised; certainly not where the record fails to show that the defendant had witnesses which he was prevented by the order from examining.
2. **Continuance.** A second application for a continuance must disclose facts showing an honest effort on the part of the applicant to prepare his case for trial, and legal diligence. If the application is made on the ground of the absence of a witness who lives in another county, and for whom a subpoena has been but lately issued, it should show when his residence was ascertained, and how soon steps were taken to ascertain it.
3. **Verdict:** FAILURE TO FIND ON ONE COUNT OF AN INDICTMENT. When an indictment consists of two counts, a verdict finding the defendant guilty as to one, but silent as to the other, is a virtual acquittal as to that count. It would be more regular to enter a *nolle prosequi*, or to have a finding of not guilty on that count; but the irregularity does not prejudice the defendant, and hence does not warrant setting aside the verdict.

*Appeal from St. Clair Circuit Court.*—HON. JOHN D. PARKINSON, Judge.

*J. L. Smith*, Attorney-General, for the State.

SHERWOOD, C. J.—Defendant was indicted and convicted of stealing a steer in St. Clair county. The instructions were unexceptionable, and were based upon sufficient evidence. The defendant is not represented in this court by counsel, so we have examined the motion for a new trial in the endeavor to discover if any substantial error has occurred, and will give the results of that examination.

I. The court below did not err in refusing to grant a change of venue. Witnesses were heard both on the side of the State and of the appellant, and the court, upon the evidence adduced, found that the alleged prejudice did not

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exist, and that finding was conclusive. *State v. Sayers*, 58 Mo. 585, and cases cited; Laws 1875, § 1, p. 109.

II. Nor are we of opinion that it was out of the power of the court to limit beforehand the number of witnesses to six on a side in reference to the pending application for a change of venue, because we regard such ruling as clearly within the domain of judicial discretion, with which, unless arbitrarily and abusively exercised, we should refrain from interfering. It would be productive of very serious and hitherto unheard of consequences, should the law be so declared by this court as to cut off and preclude inferior tribunals from the exercise of one of the most ordinary functions pertaining to the daily administration of justice. Thus courts ex. gr. limit by previous announcement to that effect, the number of impeaching and of supporting witnesses to a certain number on each side. *Bunnell v. Butler*, 23 Conn. 65. In that case it was said that: "It would be absurd to hold that upon an inquiry of that sort, depending, in a great measure, upon the opinion of witnesses, a party has the right to examine as many as he pleases, and that the court and jury are bound to sit and hear them without any power to interfere. There must necessarily be a limit to such inquiries, and it is for the court to prescribe it." I confess my inability to distinguish the principle involved in the present case from that involved in the case just cited. Any other theory of the law would permit, nay, prompt a crafty criminal to block the wheels of both punitive and remedial justice, by using the latest census returns of the county as a fecund course of limitless supply for countless subpoenas, thus securing a continuance under the pretense of securing a change of venue. And to those who, from long practice at the bar, are familiar with artifices of criminals, such an one will seem neither impossible nor improbable.

But conceding that an applicant for change of venue has the abstract right to summon innumerable witnesses,

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and impose upon the court the unpleasant task of meekly listening, at his good pleasure, to interminably cumulative testimony, still it does not appear that the defendant has been prejudiced by the action of the court, because, from aught that appears, he had no more witnesses to examine than the number brought forward in response to the ruling complained of. A party who insists he is injured by the action of the court, must show in what the alleged injury consists, or else those favorable intendments which the law indulges in respect to the lower tribunals, will, as they ought to, prevail.

III. The next point to be examined is the refusal to grant the continuance defendant applied for. It seems  
2. CONTINUANCE. that defendant was arrested in July or August, 1876, for stealing cattle, on affidavit filed before a justice of the peace. His indictment for that offense followed at the next September term of that year. That indictment charged, in its first count, the stealing of an animal belonging to one Shaffner; in its second, the larceny of two head of cattle belonging to one Chevington. The indictment on which defendant was tried, charged in both counts the stealing of the cattle whose owners were to the grand jurors unknown. The first application for a continuance was made at the September term, 1877, when the latter indictment was found. It was filed September 5th, 1877, and was based on the absence of two witnesses, Copeland and Talley, who were then alleged to be residents of St. Clair county, for whose appearance subpoenas were alleged to have unsuccessfully issued on the 23d of August of that year. And in that application it was urged that the State having entered a *nolle prosequi* as to the first indictment, and found a second one, (on the day previous,) which differed from the first, in that it did not allege the names of the owners of the cattle, but charged that those names were to the grand jurors unknown, the defendant was taken by surprise, was not ready for trial, but believed he would be able to procure the attendance of the witnesses



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named at the next term thereafter, if a continuance were granted him. The continuance was granted.

At the next term, which commenced on the 4th day of March, 1878, the defendant, on the next day, and immediately upon his application for a change of venue being denied, again applied for a continuance, based, also, on the absence of Copeland and Talley, as well as other witnesses. The State obviated under the statute (*State v. Miller*, 67 Mo. 604), the necessity for the presence of any of the witnesses except Copeland and Talley. As to Copeland, not the slightest pretense of diligence was shown; not even a subpoena issued. It was alleged, however, in the application, that a subpoena had been issued for Talley and sent to the sheriff of Henry county, on the 16th day of the preceding February; that Talley resided in that county, about 20 miles from the place of trial; that the subpoena had not been returned, but that the sheriff of Henry county had, on the night of February 28th, stated to one of defendant's counsel that he sent a deputy that day to serve the subpoena, and if the deputy did not find the witness by the 1st or 2d of March, he himself would go down on the 3d of March to the neighborhood where the witness resided, stay there all night and serve the witness on the 4th of that month. The application then concludes in the usual way, and the only question arising thereon is, has the requisite amount of diligence been exhibited? We think not. The defendant had been arrested and brought before a justice of the peace over a year and a half before for stealing cattle; the same cattle, it may be reasonably inferred, he was, in three weeks thereafter, indicted for stealing.

The indictment then found contained two counts, specified the names of a different owner in each count, and remained pending against defendant for one whole year, or until September, 1877, when the second indictment was found, which differs, as above seen, in no essential particular from the first one, except that the names of the

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owners of the cattle are declared to be unknown. The fact that defendant had been unsuccessful in obtaining service on Copeland and Talley six months before, should have stimulated him to greater diligence, to have the witnesses subpoenaed, or to have taken their depositions, anterior to the term at which the second continuance was applied for, but defendant takes no subpoena for Copeland, and none for Talley until some fifteen days before the day of trial. At what time he learned the residence of Talley, we are not informed; and as no presumptions are indulged in favor of applications for continuances, defendant may, for aught that appears to the contrary, have been aware of that residence for months before his trial came on. In a recent case in this court, *State v. Lawther*, 65 Mo. 454, it was ruled that a second application for a continuance must "disclose facts showing an honest effort on the part of the applicant to prepare his case for trial, and legal diligence;" that the application should show when the residence of the absent witness was ascertained, and that immediately, or very soon after the first continuance, inquiries were instituted by letter, or otherwise, to learn where that residence was. Tested by these rules, the application is entirely insufficient, and does not comply with well established legal requirements. Again, the granting of continuances rests very much within the sound discretion of the trial court; which discretion will not be interfered with, unless unsoundly and oppressively exercised. *Bartholow v. Campbell*, 56 Mo. 117; *State v. Hollenscheit*, 61 Mo. 302; *Farmers Bank v. Williamson*, Id. 259; *State v. Sayers*, 58 Mo. 585; *State v. Burns*, 54 Mo. 274.

IV. But one point remains for discussion. It is claimed that the verdict should have been set aside, because the jury only found the defendant guilty on the first count, and failed to make any finding on the second. In reference to this it may be observed that the second count was practically abandoned at the trial, no evidence being introduced or

3. VERDICT: failure to find on one count of an indictment.

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instructions given respecting it. While it would have been more in conformity with regularity of procedure to have entered a *nolle prosequi* as to that count, or to have found in defendant's favor in regard thereto, yet the failure to find on that count has not prejudiced the defendant, and may be regarded as a virtual acquittal as to the charge therein contained.

Judgment affirmed, in which all concur, except Judge HENRY, who is of opinion that the continuance should have been granted.

AFFIRMED.

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THE STATE V. SWEENEY, *Plaintiff in Error.*

1. **The Motion for New Trial** must be incorporated in the bill of exceptions.
2. **Temporary Judge.** *State v. Miller*, 67 Mo. 604, affirmed.
3. **Pleading, Criminal.** It is no objection to an indictment presented at an adjourned term of court held in June, that it purports in the caption to have been presented at the "June special term."
4. **Grand Jury.** The circuit court has authority to empanel the grand jury at an adjourned term.

*Error to Mississippi Circuit Court.*—This case was tried before J. D. FOSTER, Esq., sitting as Temporary Judge.

*T. C. Spellings* for plaintiff in error.

*J. L. Smith*, Attorney-General, for the State.

HOUGH, J.—At an adjourned term of the Mississippi circuit court, begun and held on the 3rd day of June, 1878, the defendant was indicted for murder in the first degree, for the killing of one Ephraim Quinn, and at the same term was tried and convicted, under said indictment, of murder in the second degree. It appears from the transcript

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that defendant was duly served with a copy of the indictment, as provided by law, was regularly arraigned, pleaded not guilty, and was personally present as required by the statute throughout the trial.

Numerous errors are alleged to have occurred during the progress of the trial, but as the motion for a new trial is not incorporated in the bill of exceptions, we are limited in our examination of the case to such errors as might be corrected on a motion in arrest of judgment. *State v. Marshall*, 36 Mo. 400; *State v. Connell*, 49 Mo. 282; *Collins v. Barding*, 65 Mo. 496; *Stevenson v. Saline County*, 65 Mo. 425; *Jefferson City v. Opel*, 67 Mo. 394.

The trial was had before a temporary judge, who, as the record shows, was elected in pursuance of the provisions of the act of May 19th, 1877. His authority to preside at the trial is beyond question. *State v. Miller*, 67 Mo. 604.

The indictment was preferred by a grand jury at what the record shows was an adjourned term of the court, and its sufficiency is assailed for the reason that in the caption it purports to have been presented at the "June special term." It appears in the record that the court adjourned in February until June, and the June term might, under the statute, (1 Wag. Stat., § 24, p. 421,) have been properly designated as a special or adjourned term, or on the authority of *Dulle v. Deimler*, 28 Mo. 583, as a "special adjourned" term. The defendant could not be prejudiced by the manner in which the term of the court, at which he was indicted, was designated, and the sufficiency of the body of the indictment is not assailed.

The circuit court had authority to empanel the grand jury at the adjourned term. Wag. Stat., § 13, p. 1083; *State v. Barnes*, 20 Mo. 413.

Perceiving no error in the record, the judgment of the circuit court will be affirmed. The other judges concur.

AFFIRMED.

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The State v. Krieger.

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THE STATE V. KRIEGER, *Appellant.*

**Larceny.** There can be no conviction of larceny without proof of the value of the property stolen; and unless the record shows that there was such proof, the Supreme Court will set aside a conviction although the error was not pointed out by counsel.

*Appeal from St. Louis Court of Appeals.*

*F. D. Turner* for appellant.

*J. L. Smith*, Attorney-General, for the State.

SHERWOOD, C. J.—Defendant was indicted, tried and convicted for stealing a package of spool-cotton. There is nothing in the record which warrants a reversal except the error committed by the court in giving of its own motion, the fourth instruction, relative to the value of the property stolen. There was no evidence, whatever, as to the value of that property, and consequently the instruction was erroneous. And even if the instruction complained of had not been given, still the verdict could not be permitted to stand, as under the law then in existence, the property stolen must have equaled or exceeded in value the sum of \$10. But, as above seen, there was no evidence as to value at all, hence a conviction would have been improper for any grade of larceny. The motion for a new trial called attention to the fact that the verdict was against the evidence; but the precise point, here mentioned, wherein the insufficiency consisted, escaped the attention of counsel. In the discharge, however, of our statutory duty, (*State v. Barnett*, 63 Mo. 300,) we have, on examination of the record, discovered the above defect, which must be regarded a fatal one. Judgment reversed and cause remanded. All concur.

REVERSED.

OCTOBER TERM, 1878.

The State v. Purdin.



THE STATE V. PURDIN, *Appellant*.

**Impeaching Testimony.** Judgment reversed for error of the trial court in refusing to admit impeaching testimony.

*Appeal from Scotland Circuit Court.*—HON. JOHN C. ANDERSON, Judge.

J. L. Smith, Attorney-General, for the State.

NAPTON, J.—Purdin was indicted in Scotland county for hog stealing, and was convicted. On the trial, one of the witnesses for the State, James McKnight, was asked if he met one Saunders on the streets of Memphis and had a conversation with him in regard to the hogs found at Richardson's, and if, in that conversation, he did not say that he did not recognize the hogs at Richardson's as his hogs, but he thought his son would? To this question McKnight answered, admitting the conversation, but denying that he said he did not recognize the hogs. On the examination of defendant's witnesses, this man Saunders was called and asked if, in the conversation with McKnight at Memphis, McKnight said to him that he could not recognize the hogs at Richardson's, but thought his boys could? This question was objected to, and the court sustained the objection, and excluded the question, and this court being of opinion that the question was proper, will reverse the judgment and remand the case. The other judges concur.

REVERSED.

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Robbins v. Phillips.

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ROBBINS, *Plaintiff in Error*, v. PHILLIPS.

**Conditional Sale:** BONA FIDE PURCHASER WITHOUT NOTICE: LACHES: WAIVER. A conditional vendor of personal property entitled by his contract to retake the property in case of condition broken, loses his right as against one who purchases from the conditional vendee *bona fide* and without notice of the condition, if the vendor is guilty of laches in asserting his right, or if his conduct has been such as to waive performance of the condition.

*Error to New Madrid Circuit Court.*—HON. D. L. HAWKINS, Judge.

*Lay & Belch* for plaintiff in error.

SHERWOOD, C. J.—Plaintiff brought replevin for a mouse-colored mule, named "Ginn," otherwise known as the Coffee mule. The evidence adduced at the trial, was shortly, this: Coffee bought the mule of defendant, Phillips, in the spring of 1874. The terms of the purchase were, that Coffee was to give his note and security in a few days for the mule; and until he did this, the mule was to remain the property of Phillips. Coffee took the mule, but never gave his note until the next fall, and even then, the note was signed by Coffee alone. Plaintiff bought the mule of Coffee January 24th, 1875, paid him for it, took the mule home and was not aware of the terms upon which Coffee had purchased. Phillips sued on the note soon after he received it; recovered judgment December 11th, 1874; upon this judgment had execution issued April 5th, 1875, by virtue whereof, the constable, on the 12th of that month, at the instance of Phillips, levied on the mule and took it out of plaintiff's possession, who, thereupon, brought this suit against the constable and Phillips, who, in their answer, denied the plaintiff's allegations; Phillips alleging that he himself was the owner of the mule.

No instructions were asked or given, and the question presented is, whether the evidence justifies the finding. We are not of opinion that it does, or that it has any ten-

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dency in that direction. There is no doubt, under the rulings of this court, that personal property may be sold upon condition, and while the condition remains unperformed, the right of property does not become vested in the purchaser. *Parmlee v. Catherwood*, 36 Mo. 479, and cases cited; *Little v. Page*, 44 Mo. 412; *Ridgeway v. Kennedy*, 52 Mo. 24. But it is also well settled by the authorities just cited, that, though in such cases the reserved right of the vendor may be asserted even against a purchaser *bona fide*, yet, that this cannot be done when the vendor is guilty of laches. That the vendor has been thus in fault we do not doubt; the note of Coffee, with security, was to have been given "in a few days," but the note was not thus given until some six or seven months after the sale, and then without the promised security—meanwhile Coffee remained in possession, the apparent owner. Again, not only was the vendor thus negligent, but the evidence clearly shows that he had waived the performance of, and thus abandoned his right to insist upon, the condition upon which the sale was made. He might have insisted upon his right to have had either the condition performed or the property restored; he did neither, but by his conduct, then and subsequently, clearly showed that whatever right and intention he may originally have had or entertained, had been waived or abandoned. *Dannefelser v. Weigel*, 27 Mo. 45. Judgment reversed and cause remanded. All concur.

REVERSED.

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THE STATE V. STONE, *Appellant*.

**Larceny, at Common Law, by Embezzlement.** An intent to steal existing at the time of obtaining the property, is an essential element of the crime of larceny, both at common law and as defined by Wagner's Statutes, section 25, page 456, but not of the crime of larceny by a bailee as defined by Wagner's Statutes, section 37, page

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459. Hence, where defendant had borrowed a wagon and horses from the owners, and was making way with them, and attempting to convert them to his own use when he was arrested, *Held*, that he could not be convicted on an indictment in the ordinary form under section 25 for grand larceny, without proof that he obtained the property with the intent of stealing it, and it did not matter that upon the evidence he might have been found guilty of larceny by embezzlement under section 37, without such proof. That is a different offense, and in order to sustain a conviction for it the indictment should have contained a count founded on that section.

*Appeal from Lawrence Circuit Court.*—HON. JOS. CRAVENS,  
Judge.

*John T. Teel* for appellant.

*J. L. Smith*, Attorney-General, for the State.

NORTON, J.—Defendant was indicted in the circuit court of Lawrence county, in November, 1877, for grand larceny. He was put upon his trial, which resulted in his conviction, and the assessment of his punishment to imprisonment in the penitentiary for two years. Motions for new trial and in arrest having been overruled, the cause is brought here by appeal. On the trial the State gave to the jury evidence tending to show that the defendant, on or about the 23rd day of August 1877, in Lawrence county, borrowed of three of his neighbors, a wagon, horse and mare, with which to haul some oats to Mt. Vernon, the county seat of said county. The defendant, after getting said wagon and team in his possession, did haul his oats to Mt. Vernon, and then sold the same and received the purchase money, and, instead of returning said property to the several owners at the time he had promised, drove the wagon and team in another direction. He was arrested in possession of the team and wagon when about to cross the Missouri river at Washington, Franklin county, Missouri. He denied his name when arrested. To one person whom he passed on his route from Lawrence county to Washington, Missouri, he told that he was on his way to Indiana, and to another

that he was going to another place. He stated, when arrested, that he was from Dade county, in this State.

Various objections to the proceedings of the trial court have been brought to our notice in the brief of counsel, the most material of which is its action in refusing, on defendant's motion, to instruct the jury to the effect that before they could find defendant guilty of the charge in the indictment, they must believe, from the evidence, that defendant received the possession of the property therein mentioned, with the intention, at the time, of stealing the same, and that although they might believe that defendant borrowed the wagon and team to haul off his oats, they would acquit, provided they further believed that the design to steal and convert the same was not formed till after he had thus obtained possession. The indictment is founded on Wag. Stat., sec. 25, p. 456, and the action of the court in refusing this declaration of law brings up the question whether, under such an indictment, a conviction can be had for the offense defined in Wag. Stat., sec. 37, p. 459, which is as follows: "If any carrier or bailee shall embezzle, or convert to his own use, or make way with, or secrete, with intent to embezzle or convert to his own use, any money, goods, rights in action, property or any valuable security or other effects which shall have been delivered to him, or shall have come into his possession or under his care, as such bailee, although he shall not break any trunk, package, box or other thing in which he received them, he shall, on conviction, be adjudged guilty of larceny, and punished in the manner prescribed by law for stealing property of the nature or value of the article so embezzled, taken or secreted."

An indictment under section 25, *supra*, can only be maintained when the State shows an intent on the part of the party charged to steal the property or goods at the time he receives them. *State v. Shermer*, 55 Mo. 83; *Witt v. State*, 9 Mo. 663; *State v. Hoffman*, 18 Mo. 329. In the case of the *State v. Hoffman*, Judge Ryland observes:

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"That the intention to steal must be formed at the time of taking or acquiring possession of the goods. The hirer of a horse for two days to go to a place north, and who, afterwards, when he obtains possession, turns to the south and sells the horse as his property, is not guilty of larceny, unless he had formed, in his mind, the design and intent to steal at the time of hiring, and not afterwards. Subsequent intent to steal will not make the taking felonious." These remarks were made with reference to an indictment simply for grand larceny, and not with reference to an indictment found on section 37, *supra*, whereby the subsequent conversion by any carrier or bailee of goods or property entrusted to him is made larceny, the grade thereof being made dependent on the nature and value of the property converted.

It will be observed that section 37, *supra*, makes that a larceny which at common law was a breach of trust, and the offense being purely statutory, if the prosecutor intended to secure defendant's conviction under it, the indictment should have contained a count charging the offense as therein defined, as the constitution requires that in all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation against him. It might as well be contended that a person indicted under section 25, *supra*, for stealing a hog, could be convicted under section 30, which makes it larceny for any person to mark or brand, or alter the mark or brand of a hog with intent to steal or convert it to his own use, as to contend that a person could be convicted under section 37 on an indictment based on section 25. If defendant, at the time he borrowed the team and wagon in question, had formed the design and intent to steal them, he could be convicted under the present indictment, but if at the time they were loaned to him he had no such design, but afterwards conceived it, then his conviction under the indictment was wrongful, as it did not charge such an offense. *State v. Arter*, 65 Mo. 653.

We have been cited to the case of the *State v. Norton*,

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Vineyard v. Matney.

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4 Mo. 461, as asserting a different principle. The form of the indictment is not given, but we think it is plainly deducible from what is said in the opinion, that it was either founded on section 42, Rev. Code 1835, which is like section 37 in our present code, or contained a count founded on that section. For the error in refusing the instruction commented on, and in giving its opposite, the judgment will be reversed and the cause remanded, in which the other judges concur.

REVERSED.

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VINEYARD *et al.*, Appellants, v. MATNEY.

**Practice.** The Supreme Court will not review the rulings of the trial court on the admissibility of evidence, unless the attention of the latter court has been called to the supposed error by the motion for new trial. It is not sufficient that exceptions were duly taken at the trial.

*Appeal from Buchanan Circuit Court.*—HON. JOS. P. GRUBB, Judge.

*Vories, Loan and Vineyard* for appellants.

*Bennett Pike* for respondent.

SHERWOOD, C. J.—Action based on written contract. The case hinges upon the propriety of the admission of parol evidence in reference to that contract. Although exception was taken to the admission of such evidence, yet, as the attention of the court was not called to the alleged error in the motion for new trial, and opportunity thus afforded for correction of the supposed error, we cannot notice the point here. *Brady v. Connelly*, 52 Mo. 19; *Saxton v. Allen*, 49 Mo. 417; and the case stands here pre-



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The State ex rel. Caldwell v. Redd,

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cisely as if the evidence had been admitted without objection. *Margrave v. Ausmuss*, 51 Mo. 561. Judgment affirmed. All concur.

AFFIRMED.

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THE STATE *ex rel.* CALDWELL V. REDD, *Circuit Judge.*

**Mandamus to compel a Circuit Judge to produce and file a Bill of Exceptions.** The counsel of the respective parties to a suit being unable to agree upon a bill of exceptions, appellant's counsel, within a day or two after the judgment, prepared and presented one to the judge, requesting him to allow and sign it. The judge laid it aside for examination, and it was lost. After the lapse of the term, but within sixty days after the judgment, the time which by stipulation between the counsel was allowed for preparing and presenting the bill, it was found and again presented to the judge, by whom it was again lost. After the lapse of the sixty days a second bill was presented to the judge, and he signed and returned it by a messenger to appellant's counsel. The next term of court passed without this second bill being presented for filing. Proceedings by mandamus were then instituted to compel the judge to produce either the original or the second bill, and file the same with the clerk, and make a *nunc pro tunc* entry on the records of the court, showing that the bill was filed in proper time. Pending these proceedings, the original bill was found and lodged in the clerk's office. Upon these facts the Supreme Court denied the application for a peremptory writ.

*Petition for Mandamus.*

The respondent was judge of the Ralls' circuit court. The first bill of exceptions was found, the second time, after these proceedings were instituted. The other facts appear in the opinion.

*Waters & Winslow* with *H. S. Priest* for relator.

*John T. Redd pro se.*

SHERWOOD, C. J.—Relator was defendant in an action in the Ralls circuit court. During the course of the trial, he saved divers and sundry exceptions to the ruling of the court and after a verdict and judgment against him, by consent of parties, entry was made of record, granting relator sixty days wherein to file his bill of exceptions. Within a day or two thereafter, and during the term of the trial, a bill was presented by relator for the signature of respondent, which bore an endorsement signed by the respective attorneys of the parties, to the effect that being unable to agree to it as a correct bill of exceptions, it was referred to the judge for correction and revision. The judge was then engaged in the trial of a cause, and not being able to then examine the bill, laid it aside until a more convenient season; and in the usual hurry incident to the closing hours of a term, it was mislaid. Afterwards, at the session of the Hannibal court of common pleas, and about the middle of May, 1877, the attention of the judge being called to the matter by Mr. Anderson, of counsel for relator, and his recollection being refreshed, the judge made the suggestion to Anderson, who, in compliance therewith, made inquiry of the clerk of the Ralls circuit court, and succeeded in obtaining the bill from the latter, who had found it among some loose papers of the court after the close of the term. Anderson, having procured the bill, presented it to the judge for his signature. But the judge being then, also, engaged in the trial of another cause, and seeing the endorsement, and not knowing in respect to what portions of the bill counsel disagreed, laid it temporarily aside, until the occurrence of opportunity for making the proper examination. The bill, however, was again lost during the term of the Hannibal common pleas court, which closed in the latter part of May. The judge, after making diligent search in his own papers, and inquiries of the clerk and attorneys of the court, failed to find the bill, which was afterwards, in De-

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cember last, found by the clerk among the files of the court, and by him forwarded to one of relator's counsel, who, in turn, forwarded it to the clerk of the Ralls circuit court, who now has it in his possession. Meanwhile, however, and after the adjournment of the Hannibal common pleas, and in June, 1877, a considerable time after the expiration of the 60 days limited by agreement of parties a bill of exceptions, prepared by Anderson, one of counsel for relator, in lieu of the lost bill, was delivered to the judge, by a grocer of Palmyra, with whom it had been left for that purpose, but who, likewise, had mislaid it, and would have entirely forgotten it, had he not accidentally discovered it. When the grocer became the trusted agent of relator's counsel for the bill's delivery to the judge, does not appear, whether within the sixty days or not; but within three days after its reception the latter examined, signed, and in order to avoid further mishaps, sent the bill to Anderson by a private messenger, who duly delivered it to him as directed. Since the delivery of the bill as just mentioned, the August term of the Ralls circuit court, for the year 1877, has been held.

The object of this proceeding, and for which the alternative writ issued, was to compel respondent to produce the original bill of exceptions, or the copy thereof, file the same with the clerk of the Ralls circuit court, and make a *nunc pro tunc* entry on the records of that court, showing that the bill was duly and properly filed, and in time, or else to show cause, &c., &c. The return of respondent not being traversed, must be taken as true. The facts which it avers are briefly given above. There is no denying that respondent has been not a little careless, especially when the bill was presented to him for signature the second time; but certainly he has evinced not the slightest inclination to avoid or refuse to sign the bill. The attorneys on both sides were certainly guilty of very gross carelessness, in making such an ambiguous indorsement on the bill, thus showing no disposition to aid in the labor of settling the

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bill. Their duty to their respective clients would certainly seem to have demanded more at their hands. It is well settled that nothing short of an absolute refusal of a judge to sign a bill of exceptions, will authorize the issuance of mandamus to compel his signature. (High's Extr. Leg. Rem., § 206). But there is no ground for such an extraordinary writ to compel the production of a bill when not in the possession of the judge, as in this instance, or to compel him to file the instrument even if possessed of it. The duty belongs to the party, or his attorney whose bill it is, to present the same for filing to the clerk, after it has been signed. Here, as before seen, the bill was signed and delivered to relator's attorney, Anderson, in whose possession, for aught appearing to the contrary, it still remains. Yet, notwithstanding this, so far as the pleadings disclose, relator's counsel have never presented the bill for filing, either in term time or vacation. It is to the last degree doubtful whether a clerk has the right to make an entry on the record in vacation, showing the filing of a bill of exceptions after the time limited for such filing has expired; and if offered for filing in term, and after the expiration of the designated time, very satisfactory reasons should be offered in aid of a motion to file, excusing the laches apparent on the very face of the application, when considered in connection with the record entry, which gave an extension of time.

Circumstances might possibly arise, where a party having been guilty of no fault, or lack of diligence in preparing and tendering a bill to be signed, could, perhaps, even after the lapse of the time limited, successfully appeal to this court, to compel a trial court to admit the bill to be filed, and cause an appropriate record entry to be made, which would operate to prevent flagrant injustice. But we certainly would not feel called upon to interpose our mandatory authority, except in a very clear case. We do not regard the present one of that sort, since it does not appear that the second bill might not have been prepared

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and tendered to the judge within the authorized period, nor that the same was so tendered; nor is there any fully satisfactory reason given for the delay; and besides all that, the relator has not even caused the bill, though signed out of time, to be presented in term time for filing. He certainly was in no condition to ask for an entry *nunc pro tunc* to be made, of which respondent states "he has no recollection," unless profert of the instrument asked to be filed, had accompanied the request, as well as preliminary steps and reasons of the character before mentioned.

We do not say, nor will we be understood as saying, that relator's case is incapable of such presentation as would warrant our interposition, but we do say that until he has presented himself in the proper attitude in the court below, as above indicated, and been refused after making a proper showing, any redress, we certainly shall decline to interfere, and therefore, as at present advised, will deny the peremptory writ.

PEREMPTORY WRIT REFUSED.

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COX v. ESTEB *et al.*, Appellants.

**Equity will not Relieve on a Ground not stated in the Petition:**

MISTAKE. Plaintiff being the beneficiary in a mortgage in which the land intended to be conveyed was not correctly described, brought his suit to have the mistake corrected. The holder of a later mortgage covering the same land, was made co-defendant with the mortgagor, the petition alleging that he knew of the mistake when he took his mortgage; and this was the only ground on which the pleadings placed the plaintiff's claim to relief as against him. At the trial it appeared that the later mortgage was given as security for a pre-existing debt. Plaintiff had judgment. On appeal by the holder of the later mortgage, it was contended, on behalf of the plaintiff, that even if the appellant had no notice of the earlier mortgage, as charged, still the judgment was right, since, the later mortgage being given to secure a pre-existing debt, the appellant

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was not a purchaser for a valuable consideration; *Held*, that the judgment could not be sustained on this ground, no such case being made by the pleadings; and the court having, upon an examination of the evidence, come to the conclusion that the appellant had no notice of the mistake, reversed the judgment.

*Appeal from Caldwell Circuit Court.*—HON. E. J. BROADDUS,  
Judge.

*Donaldson & McLaughlin* for appellants.

*Crosby Johnson* for respondent.

HENRY, J.—This was an action in the circuit court of Caldwell county to correct an alleged mistake in a mortgage executed by Wm. M. Esteb to the plaintiff, Cox. By this mortgage said Esteb intended to convey, in addition to fifteen acres correctly described therein, the east half of the northeast quarter of section 21, township 56, range 28, but by mistake conveyed the east half of the northeast quarter of section 20. This mortgage was executed and recorded on the 18th day of February, 1873. On the 3d day of January, 1874, said Wm. M. Esteb executed a mortgage to his father, his co-defendant, by which he conveyed to him the 80 acre tract which he intended to convey, and supposed he had conveyed, to Cox. The petition alleges that John M. Esteb, when he received his mortgage, knew that William had, by the mortgage to Cox, conveyed, or intended to convey, the same to plaintiff. That the alleged mistake did occur in the mortgage to Cox was admitted on the trial. Respondent contends that, as the mortgage to John M. Esteb was made to secure a pre-existing debt due him from Wm. M. Esteb, and said John M. Esteb advanced no new consideration nor released any security he held for the pre-existing debt, he cannot be regarded as a purchaser for a valuable consideration, and, therefore, Cox's mortgage is entitled to priority over his, whether he had notice or not, that Cox's mortgage was intended to embrace the land in controversy. It is a sufficient answer



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to this, that in the petition it is not alleged that John M. Esteb's *was*, or that Cox's *was not*, a pre-existing debt. The case made by the pleadings is the only one for consideration here, and, therefore, the only question is as to the sufficiency of the evidence to show that John M. Esteb had notice of the mistake as alleged in the petition.

Plaintiff introduced as a witness the defendant John M. Esteb, who testified that he knew Cox had a mortgage on William's land, but did not know what land or the amount of the debt; that he knew when William bought the land of Merchant, that he assumed the debt, or part of the debt, from Merchant to Cox; did not know the amount of the debt, but supposed it was not half as much as it appeared to be; that he got Thomas Butts, an attorney, to examine William's title, which he did, and reported to witness that he would be perfectly secure if a school mortgage upon the land were paid off; that he made no examination himself, because his eye-sight was very defective; that he never knew that Cox's mortgage was intended to embrace the land in controversy. Lemuel Dunn, for plaintiff, testified that shortly after the institution of this suit he had a conversation with John M. Esteb, in which Esteb asked why he was joined in the suit. Witness told him of the mistake in the Cox mortgage. Esteb said he did not know why he was sued, as he had not signed the note to Cox; said he was not able to pay the Cox debt; that he was not in a situation to pay it, and supposed he would have to lose his claim against William. Cox, the plaintiff, testified to a conversation he had with John M. Esteb sometime after the execution of the mortgage to said Cox; that Esteb stated that he was opposed to the purchase by William of the Merchant land, on the ground that he did not think that William could ever pay the debt due plaintiff, and also the mortgage to the county. Witness did not state to John M. Esteb what lands his mortgage embraced. Wm. M. Esteb testified that he knew nothing of the mistake in the Cox mortgage until this suit was commenced;

that he never told his father what lands the Cox mortgage conveyed, or anything about the Cox mortgage; that when he was talking to his father about giving him a mortgage, he told him to refer to the records. This was all the evidence for plaintiff.

For the defendant, Thomas J. Butts testified that John M. Esteb employed him to examine the title to the land included in the mortgage to him from William; that witness did so, and told him that his mortgage would be good if the school mortgage on the land were paid off; that witness then prepared the mortgage from Wm. M. to John M. Esteb; that witness knew nothing of the Cox mortgage, except as appeared of record. Did not know that the Cox mortgage was intended to convey the 80 acres in controversy. This was all the evidence introduced by the defendant, and thereupon the court rendered the judgment complained of.

It is not alleged in the petition, nor was it proved on the trial, that Wm. M. Esteb did not own the land described in the Cox mortgage, and in the absence of an allegation and of proof to the contrary, we cannot assume that he was not the owner of that land. If it had been established on the trial that he did not own that land, and that John M. Esteb knew that he did not, it would have been a circumstance from which it might properly have been inferred that he knew there was a mistake in the Cox deed. Here, then, is a conveyance to Cox of certain land which we assume to have been owned by Wm. M. Esteb, and John M. Esteb might well have supposed that the mortgagee, Cox, was satisfied with a mortgage on those lands. He testified that he did not know that there was a mistake in the deed; that so far from knowing the amount of the Cox debt, it was double the amount he supposed. The son, William, testified that he said nothing to the father about the Cox deed, and that he was, himself, ignorant of the mistake that was made until this suit was commenced.

The evidence most confidently relied upon to prove

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that John M. Esteb knew of the intention to embrace the land in controversy in the Cox mortgage, is that of Lemuel Dunn, that John M. Esteb said that he supposed he would have to lose his claim against William. It will be borne in mind that this was after Dunn had told him that his was a second mortgage on the land, and that there was a mistake in the Cox mortgage. He may have supposed that the law on that state of facts would give the Cox mortgage the priority over his, and his remark to Mr. Dunn is entirely consistent with absolute ignorance, on his part, of the mistake in the deed, and of the intention of the parties to the Cox mortgage, thereby to convey the land in dispute. The plaintiff alleged that John M. Esteb took his mortgage with notice of the mistake in the Cox mortgage, and it was for him to prove that averment. We are not to presume, because of their intimate relation, especially in the face of the direct testimony of both father and son to the contrary, that the father knew what the son knew in regard to the mortgage to Cox. They were witnesses introduced by the plaintiff to establish the facts alleged in the petition, but their evidence proved the contrary, and reliance must be placed upon the statement made by John M. Esteb to Dunn, to overcome the positive testimony of these witnesses, and that statement, as we think, was consistent with perfect good faith on the part of John M. Esteb.

We are not inclined to reverse a judgment, even in a case where this court will, as in the present, review the evidence and correct the finding of fact of the trial court when the evidence is, apparently, evenly balanced, or although, in our judgment, the preponderance is against the finding, unless we think the preponderance so manifest, that the court must have labored under some misapprehension in regard to the evidence. We are inclined to the opinion, in this case, that some material evidence has, by inadvertence, been omitted from the bill of exceptions, otherwise we are at a loss to conjecture upon what ground

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Matthews v. The City of Alexandria.

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the court found, from the evidence, that John M. Esteb had the notice alleged in the petition. All concurring, the judgment is reversed and the cause remanded.

REVERSED.

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MATTHEWS V. THE CITY OF ALEXANDRIA, *Plaintiff in Error.*

**Municipal Corporation cannot delegate its Legislative Powers:**

WHARVES. It is well settled that the legislative powers of a municipal corporation cannot be delegated. They are in the nature of public trusts conferred upon the legislative assembly of the corporation for the public benefit, and cannot be vicariously exercised. Hence, a city authorized by its charter to erect, repair and regulate public wharves, and to fix the rate of wharfage thereat, cannot lease its wharf, or farm out its revenues, or empower any one else to fix the rates of wharfage; and a contract whereby the city undertakes to do these things is void.

*Error to Schuyler Circuit Court.*—HON. JOHN W. HENRY, Judge.

*J. G. Blair* for plaintiff in error.

*James Hagerman* for defendant in error.

HOUGH, J.—This was a suit upon one hundred and ten bonds of the city of Alexandria, twenty of which are dated October 8th, 1859; thirty are dated December 3d, 1859, and sixty are dated July 7th 1860, each for \$100, payable ten years after date, with ten per cent. interest, to A. Maxwell, or his assigns. The petition alleges the written assignment thereof by Maxwell to William Matthews, the plaintiff, on the 26th day of August, 1872. The bonds are not payable out of any particular fund, but are the absolute obligations of the city to pay the sums specified. The city, in its answer, admitted the validity, due execution and delivery of the bonds, and stated that they were

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executed by the city for a debt due Maxwell for the construction of the public wharf of the city. The answer further averred that the city, under its charter, had the power to erect, repair and regulate public wharves and docks, and fix the rates of wharfage thereat, and issue the bonds of the city thereon, and to appropriate and apply the wharfage and dockage arising therefrom in payment of such bonds. The answer, also, sets out a certain contract made on the 5th day of November, 1867, between said Maxwell and the city, in words and figures, as follows:

“This agreement, made and entered into by and between the city of Alexandria, Clark county, Missouri, of the first part, and Andrew Maxwell, of the second part, witnesseth, that, whereas, the said city of Alexandria is indebted to the said Andrew Maxwell in the sum of \$11,000, besides accrued interest, being an indebtedness created by the construction of the wharf, or levee, along the Mississippi River, in front of said city, and which indebtedness is evidenced by certain bonds, each for the sum of \$100, issued by the mayor and register of said city, all dated July 7th, 1860, December 3d, 1859, and October 8th, 1859, payable unto the said A. Maxwell, or assigns, and each due ten years after date, as by the interest coupons thereunto attached; Now, for value received, and for the purpose of paying and discharging said indebtedness, it is hereby agreed by and between said parties, as follows: The said city hereby leases to said Maxwell the said wharf in front of said city, for a period of twenty years from this date, and the said city also authorizes the said Maxwell to collect for his own use and benefit from all vessels and persons, except the ferry, all charges by way of wharfage or otherwise accruing during the said period of twenty years, and also all wharfage due and unpaid up to date of this contract; and the said city of Alexandria also agrees to protect and defend the said Maxwell in the use and enjoyment of the rents and profits and income of said wharf, or levee, by

way of wharfage or otherwise, except the ferry, during the whole of said period; and also to pay any cost and expense which he, the said Maxwell, may be put to in the way of defending or protecting his right thereto by way of litigation or otherwise; and the said city will not hold itself responsible for any costs that may accrue in the collection of debts by the said A. Maxwell that were made previous to the date of this contract, or any costs or expenses that may be made by reason of negligence, on his part, during the term of this agreement; and the said city guarantees to the said Maxwell the right to collect reasonable wharfage from all boats, crafts, vessels, &c., except the Warsaw and Alexandria ferry, landing at the said city of Alexandria, whether they shall land in front of said paved or completed levee or elsewhere.

In consideration whereof, the said Andrew Maxwell agrees that the receipts by him of said wharfage, and of the rights and privileges hereinbefore guaranteed to him by the said city, shall be in full and complete payment and discharge of the bonds and coupons hereinbefore described as held by him against said city; and the said Maxwell also agrees to keep the paved portion of said levee (that is, the levee from a point opposite the mouth of Pearl street to the alley running between block ten (10) and eleven (11) on the Des Moines River), in good condition, ordinary wear and tear and unavoidable accidents excepted, and to return said wharf to said city at the expiration of said term of twenty years. The said Maxwell also agrees that he will not charge for wharfage, during the time he shall hold said levee, a price or prices higher than the average price or prices charged at the cities of Canton and LaGrange, Missouri, and Warsaw, Illinois. It is also further mutually agreed that the aforesaid bonds and coupons shall be deposited with James FitzHenry for safe keeping, and to hold them in trust for the parties hereto; and that at the expiration of said term of twenty years, in the event that said city fulfills its part of this agreement,



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the said James FitzHenry shall deliver said bonds and coupons to the said city to be canceled, as having been paid in full; but in case, for any cause, the said city shall fail to carry out this contract, and the said Maxwell shall, at any time, be deprived of said wharfage, or held not to be entitled thereto under this agreement, then this agreement shall become void, except that any money actually received by said Maxwell under it, shall apply towards the cancellation of said bonds and coupons, and in that case the said James FitzHenry shall return the uncanceled bonds and coupons to the said Maxwell or assigns, whose claims and rights thereunder shall remain unimpaired. The said city requires that the said Maxwell, or assigns, shall keep an account on a book for that purpose, of the receipts of all wharfage collected by him. In witness whereof, the said parties (the said city, by its mayor, acting under the authority of an ordinance of the board of alderman,) have hereunto signed their names this 5th day of November, 1867.

“WM. SHERVIN,

“Mayor of the City of Alexandria.

“A. MAXWELL.”

The answer pleads the foregoing contract, in bar of this suit, and sets up counter claim for not using due diligence in collecting wharfage, counter claim for not keeping proper books, counter claim for not keeping wharf in proper repair, and counter claim for wharfage actually collected. On motion of plaintiff, the court struck out all that part of the answer referring to said contract, except the portion setting up a claim for money actually collected thereunder, on the ground that the city had no power to make the same.

The replication to the answer admits that the bonds were given for a debt due Maxwell for constructing the public wharf of the city, but deries that the city had the power to appropriate the wharf revenues to the payment of the bonds, or to lease the wharf; and avers the pre-

tended contract of lease to be void for want of power in the city to make it. Upon the trial the court rendered judgment for the amount of the bonds with interest, less the amount of wharfage actually collected by Maxwell and Matthews, treating that as money received by them for the use and benefit of the city, and the defendant has appealed to this court.

The principal question presented for our determination is, whether the contract of November 5th, 1867, between Maxwell and the city is valid. It is well settled by judicial decisions in this State, and elsewhere, that the legislative powers of a municipal corporation cannot be delegated to others. Such powers are in the nature of public trusts conferred upon the legislative assembly of the corporation for the public benefit, and cannot be vicariously exercised. *Cooley Con. Lim.*, 204, 205; *City of St. Louis v. Clemens*, 43 Mo. 403; *City v. Clemens*, 52 Mo. 138. By the charter of the city of Alexandria, authority was conferred upon the city council to erect, repair and regulate public wharves and docks, and to fix the rate of wharfage thereat. Acts 1849, 352; Acts 1851, 393. No authority was given by the charter to the city to lease the wharf, or farm out its revenues, or to empower any one else to fix the rates of wharfage. All these things were attempted to be done by the contract under consideration, and being wholly unauthorized, the contract was illegal and void. The legislative authority of the city could not be delegated, nor could the city abdicate its control over the public property held in trust by it for the benefit of the public. *Dillon on Mun. Corp.*, vol. 2, §§ 445, 512. *Illinois Canal Co. v. St. Louis*, 2 Dill. Rep. 84, 92; *Oakland v. Carpentier*, 13 Cal. 540; *Gale v. Kalamazoo*, 23 Mich. 344.

We see no merit in the objection made to the right of Matthews to the possession of the bonds as the assignee of Maxwell, nor do we perceive any error in the action of the court on the pleadings. The judgment of the circuit court will be affirmed. The other judges concur. **AFFIRMED.**

THE STATE V. COFER, *Plaintiff in Error.***Verdict silent as to one of the counts of the Indictment: RAPE.**

When an indictment, in distinct counts, charges a rape and an attempt to commit a rape upon the same person, referring to the same act, a verdict of guilty as to either count amounts to an acquittal of the crime charged in the other. The failure of the jury to make an express finding as to the latter, therefore, is not error requiring a reversal of the judgment.

*Error to Cape Girardeau Circuit Court.*—HON. D. L. HAWKINS, Judge.

The indictment upon which defendant was tried, consisted of two counts. The first charged a rape upon a female under the age of twelve years; the second, an assault to commit a rape upon the same female. Both related to the same act. The jury returned a verdict, finding the defendant guilty as charged in the first count, but silent as to the second. The fifth instruction given for the State, but subsequently withdrawn by the court from the consideration of the jury, is as follows:

5. On the first count of the indictment the court instructs the jury that, if they believe from the evidence that the defendant, on the 7th day of June, 1877, or at any other time within three years before the finding of the indictment, and at the county of Cape Girardeau, and State of Missouri, did unlawfully and feloniously attempt to carnally know and abuse Anna Waldman, she being a female child under twelve years of age, and that he did any act toward the consummation of such offense, but failed in the perpetration thereof, the jury should find the defendant guilty of an attempt to commit rape upon the said Anna Waldman, and should assess his punishment at imprisonment in the penitentiary for a term not less than two years.

The first instruction, as given in its modified form for the defendant, is as follows:

1. That the proof of the crime of rape, or of carnally and unlawfully knowing and abusing a female child, must show that there was some degree of entrance of the male organ within the private parts of the female, and if the jury find from the testimony in this cause that the private parts of the child were not penetrated by defendant's private organ or penis, then the jury ought to acquit defendant of the crime of rape as charged in the first count of the indictment.

*J. L. Smith*, Attorney-General, for the State.

HENRY, J.—It will be observed that the indictment contained two counts, one for committing and the other for attempting to commit a rape. The jury found the defendant guilty on the first count, but returned no verdict on the second; and this, it is alleged, was an error for which the judgment should be reversed. The accused was put upon his trial on both counts, and his conviction on either amounted to an acquittal of the charge contained in the other. If found guilty of committing the rape he could not have been found guilty of attempting the commission of the same rape. In *State v. Pitts*, 58 Mo. 558, this court held that a general finding of guilty, when an indictment contains three counts, if the several counts relate to the same transaction, will support a judgment.

We see no objection to the first instruction given for defendant. The defendant complains that the court refused to give it as asked, and gave it in a modified form. In what form it was presented, or how modified, is not disclosed by the record. It certainly is not objectionable as given. The fifth given for the State, the record shows was withdrawn from the jury by the court before argument of counsel was concluded. The evidence is of the most disgusting character, sickening in its details, and will be omitted. All concurring, the judgment is affirmed.

AFFIRMED.

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McCutcheon v. Rivers.

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MCCUTCHEON v. RIVERS, *Appellant.*

**Insurance:** LIABILITY OF AGENT FOR PREMIUMS TAKEN AFTER COMPANY HAS BEEN EXCLUDED FROM THE STATE. An agent of an insurance company who issues a policy and takes the premium after the company's certificate of authority to do business in this State has been revoked by the superintendent of the insurance department, is liable to return the premium notwithstanding he was not, at the time, aware of the revocation, and the four weeks notice of revocation required by Wag. Stat., sec. 32, p. 772, has not been given by the superintendent.

*Appeal from Jasper Common Pleas Court.*—The case was tried before G. W. Crow, Esq., sitting as Temporary Judge.

On the 13th day of October, 1874, defendant, as local agent in Jasper county, Missouri, of the National Insurance Company, of Philadelphia, Pennsylvania, issued to the plaintiffs a policy of insurance in that company, for which they paid him a premium of \$37.50. Defendant immediately sent the money to the company in the regular course of business. On the 11th of the preceding September the superintendent of the insurance department of Missouri had issued a circular purporting to contain the names of all the companies authorized to do business in the State, among which was included this company; but on the 25th of the same month he had revoked its authority. Of the revocation, however, defendant had no notice until several days after he had issued the plaintiffs' policy and remitted the money, when he saw an announcement of the fact in a St. Louis newspaper. Whether this was an official announcement, or whether any official notice of the revocation was ever given does not appear by the record.

On the 24th day of August, 1875, plaintiff brought this suit to recover the premium so paid, charging that defendant had fraudulently placed the risk in this company. The instructions given by the court at the trial ignored the question of fraud, and declared the plaintiffs entitled to

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recover upon the facts stated. The court refused an instruction offered by the defendant to the effect that the plaintiff could not recover because the company's authority had not been revoked four weeks before the issuing of plaintiffs' policy, and notice of revocation had not been given in any newspaper published in St. Louis once a week or oftener, for four weeks before said date. Defendant claimed that this instruction was warranted by Wag. Stat., sec. 32 p. 772, which provides that when the superintendent of the insurance department shall become satisfied that the affairs of any insurance company are in an unsound condition, he shall revoke the certificate of authority granted to such company, and shall cause a notice of such revocation to be published once a week or oftener, for at least four weeks, in some newspaper published in the city of St. Louis, and the agent or agents of such company are, after such revocation and notice, required to discontinue the issuing of new policies, or the collection of any premiums. Plaintiffs had judgment and defendant appealed.

*Harding & Buller* for appellant, argued that under section 43 of the insurance law (Wag. Stat., 777) defendant was liable to a fine of \$500, but the policy was not void. *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; besides, defendant had paid over the premium money to the company long before this suit was brought, and that of itself was a complete defense to the action. *Snowdon v. Davis*, 1 Taunt. 359; 18 Mo. 237.

*G. H. Walser* for respondents, argued that there was no such company in law as the National Insurance Company, of Philadelphia, and hence appellant was not an agent.

NAPTON, J.—This suit was brought to recover back \$37.50 paid Rivers as agent of an insurance company in Philadelphia, about ten days after the superintendent, in St. Louis, had revoked the license of the company to do



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business in this State. The publication of the fact of revocation is required to be for four weeks. The agent in Jasper county, the defendant, did not see it, and therefore took the premium. The majority of this court are of opinion that the plaintiff is entitled to recover, that the revocation of the license is the material fact, that the four weeks publication is intended to distribute the information as extensively as possible, but that the agencies cease when recalled and notice is given. Judgment affirmed.

AFFIRMED.

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THE STATE V. ALLEY, *Appellant*.

**Assault to Kill.** Whether a defendant, charged with assault with intent to kill, had, at the time of committing the alleged assault, reasonable cause to apprehend a design on the part of the other party to do him some great bodily injury and immediate danger that such design would be carried into execution, is a question for the jury, and when there is evidence tending to prove that he had such reasonable cause of apprehension, it is manifest error for the court to refuse instructions which submit that question to the jury.

*Appeal from Wayne Circuit Court.*—HON. R. P. OWEN,  
Judge.

Indictment for an assault with intent to kill. The evidence, on the part of the State, tended to prove that defendant went to a store at Coldwater, in Wayne county, to buy coal oil; that as he entered the door, one Wakefield, who was already there, called out from the opposite side of the store, "There is Cal. Alley, the damned —," and then approaching within five or six feet of defendant, repeated "You are a damned —," at the same time leaning forward towards him; that defendant, without saying a word, drew a pistol and fired three shots, two of which took effect upon by-standers, wounding them; and that

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Wakefield was unarmed; and there was nothing about him to lead one to suppose he was armed.

The evidence, on the part of the defendant, tended to prove that when he entered the store he said nothing except "Good evening, gentlemen," then walked directly to the counter and asked for the oil; that Wakefield was about eighteen feet from him at this time; that when defendant fired Wakefield had come within two or three feet of him, and was leaning over towards defendant with his hands thrown back of his hips; that it was about sundown, and the light was not good in the room; that defendant supposed Wakefield intended to do him some great bodily harm; that defendant was much excited, and only thought of protecting himself when he fired, and that Wakefield, when the first shot was fired, stooped down behind the stove and said "Shoot and be damned."

Instructions Nos. 1. given by the State, is as follows: "If the jury are satisfied from the evidence that the defendant, William C. Alley, in the county of Wayne, State of Missouri, did, at any time within three years next before the finding of the indictment in this case, on purpose and of malice aforethought, shoot at John B. Wakefield with a pistol, with intent to kill the said Wakefield, they ought to find said defendant guilty, and assess his punishment to imprisonment in the penitentiary for any period not exceeding ten years, nor less than two years."

Instructions Nos. 1 and 2, asked by the defendant and refused by the court, are as follows: No. 1. "When one has reason to apprehend immediate danger that a felony will be committed upon him, he may use whatever force or violence is necessary to protect himself, even though in the fray he wound his assailant with a deadly weapon; and it is not necessary to his justification that in fact a felony was about to be committed. As to whether he was, under the circumstances, justified in employing the weapon, and the measure of violence used, is a question to be passed upon by the jury." No. 2. "If the jury believe from

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the evidence that defendant had reasonable cause to apprehend a design on the part of John B. Wakefield to commit a felony upon him, or to do him some great bodily injury, and that there was reasonable cause to apprehend immediate danger of such design being carried into immediate execution, then the jury are instructed that the shooting was justifiable, and they should acquit the defendant." Defendant was convicted and appealed to this court.

*Yancey & Harold* for appellant.

*J. L. Smith*, Attorney-General, for the State.

HENRY, J.—The court, in giving instruction No. 1 for the State, and refusing Nos. 1 and 2 asked by defendant, entirely ignored the evidence as well that adduced by the State as by the defendant, as to the conduct of Wakefield toward defendant. The evidence showed that Wakefield, and other persons, were in a store when defendant entered, politely saluted the company, and walked up to the counter with a can, and asked the merchant for coal oil; that, when he entered, and after he had respectfully passed the ordinary salutation, Wakefield remarked, "There is Cal. Alley," applying to him at the same time an indecent epithet. Then advancing toward defendant, and when within three or four feet of him, leaning over toward him and throwing his hand back behind him, he again applied to him the same indecent epithet. Thereupon, the defendant drew his pistol and made the assault for which he was indicted. On this state of facts, it was not for the court to say that defendant had no reasonable cause to apprehend a design on the part of Wakefield to do him some great bodily injury, and that he had no reasonable cause to apprehend immediate danger that such design would be carried into immediate execution. The jury should have been permitted to pass upon these questions, and it was manifest error in the court to refuse the

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instructions asked by defendant. All concurring, the judgment is reversed and the cause remanded.

REVERSED.

MERS V. THE FRANKLIN INSURANCE COMPANY, *Appellant*.

1. **Agreement to convey Real Estate.** The purchaser at an execution sale of real estate, gave the defendant in the execution a written promise to reconvey, upon the payment of a specified sum by a day named; but the defendant did not bind himself to make such payment, and the promise was founded on no consideration. On the same day the defendant accepted from the purchaser a lease of the same premises, went into possession, and paid rent, but never paid anything in redemption of the property; *Held*, that the promise for a reconveyance was a mere gratuity, giving the defendant option to redeem, but no vested interest, and that his only interest in the property was the leasehold.

2. **Fire Insurance:** STATEMENT OF THE INTEREST OF THE INSURED: WARRANTY. A party having an interest in a house and lot, as stated above, took out a policy of insurance upon the house, containing an express condition that, if the interest in the property to be insured be a leasehold, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance should be void. The policy contained no statement of the interest of the insured, but described the property as "his." The court, reversing a judgment for the plaintiff, *Held*, that if the insured truly represented his interest to the company its failure to incorporate the statement in the policy did not avoid the policy; but if he made no representation at all, his acceptance of the policy amounted to a declaration that his interest was absolute, and that did avoid it.

*Appeal from Cass Circuit Court.*—HON. FOSTER P. WRIGHT,  
Judge.

*Adams & Sherlock* for appellant.

The only statement in the policy as to ownership was the word "his" before the description of the property in-

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sured. This taken in connection with the condition as to the statement of the interest of the insured imports an absolute and entire ownership. *Clay F. and M. Ins. Co. v. Huron Salt and Lumber Co.*, 31 Mich. 346; s. c., 14 Am. Law Reg. (N. S.) 460; and this amounts to a misrepresentation, which avoids the policy, *Catron v. Tenn. Ins. Co.*, 6 Hump. 176; *Brown v. Williams*, 28 Me. 262; *Philips v. Knox Co. Mut. Ins. Co.*, 20 Ohio 178; *Leathers v. Ins. Co.*, 4 Fost (N. H.) 259; *Warner v. Middlesex Mut. Assn.*, 21 Conn. 444; *Wilbur v. Bowditch Mut. Ins. Co.*, 10 Cush. 446; *Birmingham v. Empire Ins. Co.*, 42 Barb. 457.

R. O. Boggess for respondent.

Respondent had an insurable interest in the property. And not being called upon by the agent to state the nature or extent of his title or interest, he was not bound to do so, and his failure so to do, constitutes no barrier to his right to recover. *Morrison v. Tenn. Ins. Co.*, 18 Mo. 262; *Boggs v. America Ins. Co.*, 30 Mo. 63. His interest was absolute. He had a valid, subsisting contract for the purchase and conveyance thereof to himself—this was a fee-simple interest. *Gaylord v. Lamar Fire Ins. Co.*, 40 Mo. 13.

HOUGH, J.—This was a suit upon a policy of insurance by which, on the 10th day of March, 1873, the defendant insured the plaintiff for one year against loss or damage by fire to the amount of \$2,000, as follows: \$1,000 on a two-story frame hotel in Pleasant Hill, Missouri, and \$1,000 on personal property. On the 18th day of April, 1873, all of the foregoing property was destroyed by fire. The plaintiff recovered judgment for the full amount of the policy, and the defendant has appealed.

The policy contained, among others, the following condition: "If the interest in the property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company and expressed in

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the policy in writing, otherwise the insurance shall be void." The written application of the plaintiff for insurance, if any such were ever made, is not in the record, and there is no evidence that the plaintiff made any representation as to the ownership of the house, but it was described in the policy as "his." It appears from the record that the house in question was sold in November, 1872, to one Yocum at sheriff's sale, under an execution against the plaintiff. On the 16th day of December, 1872, Yocum, by his agent, A. C. Briant, executed and delivered to the plaintiff the following instrument of writing: "This agreement, made and entered into this 16th day of December, 1872, by and between M. B. Yocum, by his agent, A. C. Briant, and F. D. Mers, all of Cass county, Missouri; witnesseth, that whereas, the said M. B. Yocum, on the 22d day of November, 1872, purchased at sheriff's sale, on execution in favor of A. Caruthers and Martha A. Hinchman, as plaintiffs, and against F. D. Mers, defendant, the following described real estate, which was conveyed to said M. B. Yocum by the sheriff, viz.: lots 7 and 8, in block C, also lots 2 and 3, in block D, all in the Pacific Railroad Company's first addition to the city of Pleasant Hill, Missouri; and whereas, the said M. B. Yocum has been compelled to pay divers sums of money for said Mers, it is hereby agreed, by and between said parties, and especially by said M. B. Yocum, by his agent, said A. C. Briant, that if the said Mers shall, on or before the 1st day of June, 1873, pay, or cause to be paid to the said A. C. Briant, as the agent of said M. B. Yocum, his heirs or assigns, the sum of \$1,480, then, and in that event, the said M. B. Yocum, by his agent, said A. C. Briant, hereby binds himself, his heirs, assigns, executors or administrators to make, execute and deliver, or cause to be made, executed or delivered to the said Mers a quit-claim deed for the real estate aforesaid. In witness whereof, the said parties have hereto set their names and seals the day and year aforesaid.



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A. C. BRIANT,  
Agent, M. B. Yocum.  
F. D. MERS."

At the same time the foregoing instrument, which relates to the property in question, was executed, Briant, as the agent of Yocum, leased the hotel to the plaintiff for one year. Briant, in his testimony, said: "The lease was of the same date as the agreement to reconvey, and both executed same date, December 16th, 1872," and it was in evidence that he received rent from the plaintiff. On the 14th day of July, 1875, Briant, who had in the mean time purchased the property of Yocum, executed and delivered to the plaintiff a deed therefor. On the 18th day of April, 1873, the day on which the property insured was destroyed by fire, the plaintiff had paid nothing under the written agreement of Yocum to reconvey. On this state of facts the defendant contends that the policy is void as to the building.

We think it quite clear from the record that the plaintiff had, at the time of the fire, only a leasehold interest in the building. The instrument executed by Yocum, through his agent, Briant, was not a contract of sale, and conferred upon the plaintiff none of the rights of a vendee of the property in question, and, hence, does not come within the rule laid down in *Gaylord v. Lamar Fire Ins. Co.*, 40 Mo. 13. So far as appears, this instrument was without any consideration, in fact, was a simple gratuity, and conferred a mere privilege upon the plaintiff to redeem the estate upon the payment of a specified sum. It conferred a mere option and not a vested interest. By it no obligation is created, on the part of the plaintiff, to pay the sum named at the time specified, or at any time, and there is no evidence of any independent undertaking to that effect. That the parties, themselves, considered it a mere privilege, is manifested by the fact that plaintiff, at the time of receiving it, accepted the lease from Yocum of the very premises embraced in the agreement, and paid

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rent therefor. It is quite evident, therefore, that the plaintiff went into possession as lessee and not as vendee; and that his interest was, at the time of the contract and the loss, a leasehold only. *Hand v. Insurance Co.*, 57 N. Y. 41.

We are next to consider whether the condition of the policy above recited has been complied with. A warranty is a part of the contract, and must be exactly and literally fulfilled. It is in the nature of a condition precedent, and no inquiry is allowed into the materiality or immateriality of the fact warranted. *Lochner v. Home Mut. Ins. Co.*, 17 Mo. 255. Where a representation is inserted in the policy, or where it is referred to in the policy as forming a part thereof, the representation becomes a warranty. Flanders, 233, and cases cited. (Conditions annexed to a policy of insurance are, likewise, a part of the policy, and are of the same effect as if incorporated in it.) By the general law of insurance, the interest of the insured in the property is not required to be specifically described in the policy. *Franklin v. The Atlantic Fire Ins. Co.*, 42 Mo. 459. (The object of the condition above cited undoubtedly was to require in all cases a representation as to the interest of the assured, and to make such representation a warranty. This condition is a reasonable and valid one.) In the case last cited this court, in speaking of a similar clause in a policy then before it, said that its object, doubtless, was to protect the company against the danger of taking risks on the property insured for so large an amount in proportion to its value, or the value of the interest of the assured, as to furnish a temptation to fraudulent conduct. In that case it appeared that the assured correctly represented his interest in the property insured, but the agent failed to incorporate the representation in the policy, and it was held that the omission of the agent amounted to a waiver of the condition by the company. But it was also held that "if no disclosure of the nature of his title and interest had been

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made, or if he had fraudulently concealed it, and then accepted the policy, the misrepresentation being of a matter material to the risk which the company had intended to assume, it would have amounted to a clear breach of warranty. This would have been a fraud on the company and the policy would have been void."

When, by the terms of the policy, no disclosure is required of the assured as to the extent of his interest, and no inquiry is made by the company in reference thereto, a lessee may, in effecting insurance, properly describe the premises as his, but his recovery will, in case of loss, be restricted to his qualified interest. *Niblo v. North American Fire Ins. Co.*, 1 Sand. 551, 561; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. 419; *Sussex Co. Mut. Ins. Co. v. Woodruff*, 2 Dutcher 541. But when a disclosure of the true interest of the assured, if the same is not absolute, is required to be made by a condition of the policy, such interest must be stated to the company, or the policy will be void. The acceptance of a policy containing the condition under consideration, without any representation as to title, or any statement of the specific interest of the assured, amounts to a declaration, on the part of the assured, that his interest is an absolute one. If the plaintiff had truly represented his interest in the property insured, the failure of the agent to incorporate it in the policy would not avoid the policy. But as it does not appear that the plaintiff stated his real interest in the building, he cannot recover for the loss thereof. The judgment must, therefore, be reversed and the cause remanded. Judges NAPTON and HENRY concur. SHERWOOD, C. J., and NORTON, J., dissent.

REVERSED.

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Browne v. The Clay Fire & Marine Insurance Company.

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BROWNE V. THE CLAY FIRE & MARINE INSURANCE COMPANY,  
*Appellant.*

1. **Insurance:** EFFECT OF PROOFS OF LOSS AS EVIDENCE WHEN OFFERED BY THE COMPANY. When an insurance company, being sued upon a policy, defends upon the ground that the plaintiff fraudulently overvalued the property destroyed for the purpose of obtaining the insurance money, and, as a basis of proof, offers in evidence the sworn proofs of loss furnished by plaintiff, that does not make them evidence of the loss in favor of plaintiff. They are only evidence of the fact that they were made and delivered to the company. The principle, that when declarations of a party are introduced in evidence by his adversary, they are to be considered by the jury, as well for the party making as for the party offering them, has no application.
2. **Instructions.** Where the ground upon which a case is defended is fully, fairly and distinctly presented to the jury by several instructions, the fact that another instruction ignores some of the evidence bearing upon the point is not ground for reversing the judgment.

*Appeal from Jackson Special Law and Equity Court.*—HON.  
R. E. COWAN, Judge.

*James Scammon* for appellant, argued that instruction No. 9 should have been given, citing *Newmark v. Liverpool & London Ins. Co.*, 30 Mo. 160; *Howard v. City Fire Ins. Co.*, 4 Denio (N. Y.) 502; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; *Blackley's Ins. Dig.*, § 14, p. 264; *Regnier v. Louisiana S. M. Ins. Co.*, 12 La. 336; also, that instruction No. 2, given for the plaintiff, should have been refused, citing *Thomas v. Babb*, 45 Mo. 384.

*John K. Cravens* for respondent, argued that the proofs were required by the conditions of the policy, and the affidavit was exacted by the defendant; neither of the documents was the voluntary production of the plaintiff, and unless disproved, are presumptively true. The defendant asserted that they were untrue, and the burden of proof was upon it to establish the truth of its assertion and the falsity of the statements contained in the documents.

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They were read to the jury by the defendant without any announcement being made that it was only for the purpose of maintaining the defense that plaintiff falsely and knowingly placed an over-valuation on the property with the intent to defraud defendant. It is the uniform rule that declarations of the adverse party, when introduced against him, may be considered by the jury in all aspects favorable to him. *Greenl. on Ev.*, vol. 1, §§ 201, 202; *Insurance Co. v. Newton*, 22 Wall. 32; *Howard v. Newsom*, 5 Mo. 523; *Rees v. Hardy*, 7 Mo. 348.

HENRY, J.—This was an action on a policy of insurance, issued by defendant, on a dwelling house and a lot of wine and vinegar stored in the cellar of the dwelling house, to the amount of \$2,100. The petition alleged the destruction of the property insured by fire on the 4th day of July, 1874, and a compliance, by plaintiff, with all the conditions of the policy.

The defenses relied upon were: First, That the plaintiff, at the time of procuring the policy, fraudulently placed an over-valuation upon the property insured by means whereof defendant was induced to issue to him the policy sued on; Second, That in his examination and statement furnished to defendant as his account and proof of loss, plaintiff fraudulently placed an over-valuation upon the property for the purpose of obtaining the amount sworn to in such statement. Either of these facts, if proven, constituted a defense to the action, because violative of express conditions of the policy. The evidence for plaintiff tended to prove the value of the property as was alleged by him before procuring the policy, and as placed upon it by him in his statement after the loss occurred. The evidence for defendant tended to prove the property of considerably less value than that placed upon it by plaintiff when the policy was procured, and that placed upon it by plaintiff after the loss occurred in his statement and proof of loss. The defendant introduced in evidence

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the statement and proofs of loss, made by plaintiff, to show that plaintiff over-valued the property, and this, in connection with the other evidence, tended to prove the defense of fraudulent over-valuation by plaintiff after the loss occurred.

For plaintiff the court instructed as follows:

No. 1. The court instructs the jury that the pleadings in this case admit that the defendant made the contract of insurance and policy sued upon, and that the plaintiff delivered to the defendant, as required by the conditions of the policy, notice and proofs of loss.

No. 2. If the jury believe from the evidence that the plaintiff was the owner of the property covered by the policy sued on at the date the policy was issued, and that he was the owner of the property covered by the policy at the date of its destruction by fire, you will find for the plaintiff not to exceed the amount covered by the policy on each kind of property insured, to which you will add interest at the rate of six per cent. per annum from October 17th, 1874, unless you further find from the evidence that plaintiff procured the policy by fraud practiced upon the defendant, or that the plaintiff, with the intent to defraud the defendant, falsely and knowingly over-rated and over valued the property destroyed.

The following instructions were asked by the defendant:

No. 1. The court instructs the jury that the burden of proof in this case is upon the plaintiff, and that he is bound to make out his case by a preponderance of the testimony.

No. 2. If the jury believe from the evidence that the plaintiff, in the affidavit and account of loss containing the preliminary proofs of loss furnished by him to this defendant, placed a false and fictitious valuation on the frame farm-house claimed to have been destroyed by fire, much higher than the actual cash value, and delivered the same to the defendant for the purpose and with the intent to



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deceive and defraud the defendant, and thereby induce it to pay more for the loss of said house than its actual cash value, then the court instructs the jury that such false swearing is a fraud, or an attempt at fraud within the meaning of the policy and contract of insurance sued on, and the plaintiff cannot recover.

No. 3. If the jury believe from the evidence that the plaintiff, in his affidavit and account of loss containing his proofs of loss furnished the defendant, made oath that the property claimed to have been lost was worth the sum of \$2,100, when in fact, and the jury so find, said property was not worth near that sum, then the burden of explanation is upon the plaintiff, and if the discrepancy remain unexplained to the satisfaction of the jury upon a fair consideration of the whole evidence, it stands as evidence of fraud, or an attempt at fraud, and so unexplained imposes upon the plaintiff a forfeiture of all claims under the contract and policy sued on, and the plaintiff cannot recover.

No. 4. If the jury believe from the evidence that the plaintiff, in his affidavit and account of loss containing his proofs furnished to this defendant, made oath that the property claimed to have been lost, to-wit: The one-story frame farm-house was worth the sum of \$1,000, when in fact, and the jury so find, the said one-story frame farm-house was not worth to exceed the sum of \$400, the burden of explanation is on the plaintiff, and if the discrepancy remain unexplained to the satisfaction of the jury, upon a fair consideration of the whole evidence, it stands as evidence of fraud, or an attempt at fraud, and, unexplained, imposes upon the plaintiff a forfeiture of all claims under the contract and policy sued upon, and the plaintiff cannot recover.

No. 5. The court further instructs the jury that if they find for the plaintiff, then the rule by which the jury is to estimate or measure the loss of the plaintiff is the actual cash value of the property shown to the satisfaction

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of the jury to have been destroyed by fire at the time the fire occurred, with interest at the rate of six per cent. per annum from the time of the suit brought.

No. 6. If the jury believe from the evidence that the plaintiff, for the purpose of inducing the defendant to enter into and execute the policy of insurance sued upon, fraudulently and falsely over-valued said property to this defendant, or its agents, and thereby, through such over-valuation, induced the defendant to execute said policy for the amount for which it was issued, then the court instructs them that such an over-valuation avoids the policy sued upon, and the plaintiff cannot recover in this action.

No 7. If the jury find from the evidence that the plaintiff, in his account of loss furnished to the defendant in this case, knowingly claimed and made affidavit that he sustained a larger amount of loss by reason of the destruction of the house burned, or any of the other property claimed to have been destroyed, than he really and in truth sustained, with the intent to obtain the sum sworn to from the defendant, and to defraud it, then the court declares the law to be that the plaintiff is guilty of a fraud, or an attempt within the terms of the policy sued upon, and cannot recover in this action.

No. 8. If the jury believe from the evidence and the circumstances attending the production of testimony, that any witness in this case has willfully sworn falsely to any material fact in the case, then, in that case, they have a right to disregard the testimony of said witness or witnesses not corroborated by other competent testimony.

No. 9. The affidavit and the account and proof of loss furnished to the defendant by the plaintiff, and read in evidence by the defendant, are to be considered by the jury as evidence of the fact only that they were so made and delivered to the defendant, and not as evidence proving or tending to prove the amount of plaintiff's loss.

Of these instructions asked by appellant, the court gave Nos. 1, 5, 6, 7 and 8, and refused to give Nos. 2, 3, 4

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and 9. Under the instructions the jury found for respondent in the sum of \$1,700, and judgment was given accordingly.

The principal ground relied upon by defendant for a reversal of the judgment is the refusal of the court to give the 9th instruction. In the case of *Newmark v. Liverpool & London Ins. Co.*, 30 Mo. 160, the affidavit and account of loss constituting preliminary proofs, were introduced by plaintiff in order to show that he had complied with the condition of the policy requiring such proof to be made, and the court held it admissible for that purpose and no other. Here the defendant introduced them. The case above cited is not an authority in support of defendant's 9th instruction, but in the case of *Howard v. The City Fire Ins. Co.*, 4 Denio 502, the precise question presented by that instruction was before the court, and on that subject Jewett, J., who delivered the opinion, observed: "The preliminary proofs were furnished to comply with a condition of the policy upon which his claim to the insurance depended. Unless that condition was shown *prima facie* to have been performed, the plaintiff would have failed to make out a presumptive right to recover. Having given the proof the defendants had the right to show, if they could, that the plaintiff had been guilty of 'fraud or false swearing' in those papers, and if shown, it would, according to the condition, bar the plaintiff of all remedy against the defendants on the policy. To do that it became necessary to read to the jury the affidavit of the plaintiff, in order to apply the contradictory evidence given. With that view of the question, the court below held that it was proper for the defendants to read the affidavit, and that it was not to be regarded by the jury as evidence in favor of the plaintiff of the facts asserted therein. In this I think the court correctly decided. After the defendant gives evidence tending to impeach the facts contained in the affidavit, the plaintiff has no right to the benefit of the affidavit as rebutting evidence of the facts

1. INSURANCE: of  
fact of proofs of  
loss as evidence  
when offered by  
the company.

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thereby asserted on the question of the falsity of the matters represented by it or of the frauds imputed." *The Madison County Bank v. Gould*, 5 Hill 309, announces the same doctrine. The principle that when declarations of a party are introduced in evidence by his adversary, they are to be considered by the jury as well for the party making as for the party offering them, has no application. The distinction and the reason for it are indicated in the two New York cases cited above.

Defendant objects to the second instruction given for plaintiff because "it fails to hypothecate all the facts necessary to sustain a verdict," there having been evidence tending to prove that plaintiff placed an over-valuation upon the property destroyed which the instruction ignored. This ground of defense was fully, fairly and distinctly presented to the jury in the 6th and 7th instructions given for defendant, and no qualified juror, honestly endeavoring to discharge his duty, could have found a verdict for plaintiff, notwithstanding the second instruction for plaintiff, if he had been satisfied from the evidence that the plaintiff had fraudulently over-valued the property insured. The 7th instruction for defendant substantially embraces the substance of the defendant's second refusal, and there was no necessity for giving both of them to the jury. For the error in refusing the 9th instruction asked for by defendant, the judgment is reversed and cause remanded. All concur.

REVERSED.

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The State v. Bradley.

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THE STATE, *Appellant*, v. BRADLEY.

**Obtaining Goods under False Pretenses.** An indictment for obtaining a stock of goods in exchange for a tract of land under false pretenses, charged that defendant *designedly*, feloniously and falsely pretended that he was the owner of the land, and averred that in truth and in fact he was not the owner; but did not charge that he knew he was not the owner; *Held*, that this was a fatal defect; the *scienter* should have been expressly averred; the use of the word "*designedly*" did not dispense with it.

The indictment also charged that defendant pretended that he had an abstract which showed a perfect title in himself; but there was no averment that he did not have such an abstract; *Held*, that the absence of this averment was fatal, and the defect was not supplied by an averment that defendant well knew the abstract to be imperfect, and untrue in showing that he had title. If such was the fact, the abstract should have been set out as a false token or writing, and the defendant should have been charged with *designedly*, feloniously and falsely pretending that it was a true abstract, and correctly represented the title to be in him; and this charge should have been accompanied by a proper negative and an averment of the *scienter*.

*Appeal from Livingston Circuit Court.*—HON. E. J. BROADBUSH, Judge.

This was an indictment for obtaining goods by false pretenses. It charged that the defendant, Bradley, contriving, designing and intending to cheat and defraud one Elijah T. Austin of his stock of goods, wares and merchandise, did apply to and request the said Austin to sell and barter to him a certain stock of general dry goods and groceries in exchange for a tract of land, and to induce the said Austin to sell and barter said stock, \* \* \* and to effect his said design and intent to cheat and defraud the said Austin, he the said Bradley, did then and there *designedly*, feloniously and falsely pretend to the said Austin, that he, the said Bradley, was then and there the owner in his own right in fee, of 160 acres of land, being, &c., and that he had an abstract of said land prepared by one Saunders, and that said abstract showed a good and per-

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fect title in fee to said land to be in him, the said Bradley; and the said Austin believing the said false pretenses and representations \* \* to be true, and being deceived thereby, and induced by the said false pretenses and representations aforesaid to sell, \* \* the said stock of general dry goods and groceries, \* \* which the said Bradley agreed and promised then and there to pay for at once by exchange of said land herein described, which said land by request of said Austin, the said Bradley was to convey by a deed of quit-claim to Frances J. Austin, the wife of said Elijah T. Austin, and which said deed purporting to convey a title in fee to said land, was then and there made and delivered by said Bradley to said Austin, to have and to hold for the use of his wife, the said Frances J.; that the said Bradley, by means of the said false pretenses and representations, so made as aforesaid, unlawfully, feloniously and designedly did obtain and receive of and from him, the said Austin, the said stock of general dry goods and groceries above mentioned, with intent, him, the said Austin, then and there to cheat and defraud; whereas, in truth and in fact, he, the said Bradley, was not then and there the owner in his own right in fee of the aforesaid tract of land; and, whereas, in truth and in fact, the abstract of said land prepared by one Saunders, that showed a good and perfect title to said land to be in him, the said Bradley, he, the said Bradley, well knew that the abstract then in his possession, which had been prepared for another person, and not for the said Bradley, was an imperfect and impartial one, and incorrect, false and untrue in showing the title in him, said Bradley, against, &c. A demurrer to the indictment was filed and sustained, and the State appealed.

*J. L. Smith*, Attorney-General, for the State.

*Davis & Wait* for respondent.



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HOUGH, J.—After a very careful consideration of this case by all the members of this court, we have reached the conclusion that the indictment is insufficient, and that the judgment of the circuit court should be affirmed. The prosecuting attorney attempted to set out two false pretenses, one in relation to the title, and one in relation to the abstract. The false representation charged to have been made by the defendant, in regard to the abstract, was, that he had an abstract prepared by one Daniel G. Saunders, showing the title to be in him. This representation was not negatived in the indictment. The pleader did not aver that this representation was untrue, but he averred that the abstract itself was false and untrue, in that it did show the title to be in the defendant. If such was the fact, this abstract should have been set out as a “false token or writing,” and the defendant should have been charged with designedly, feloniously and falsely pretending that it was a true abstract and correctly represented the title to be in him; and this charge should have been accompanied with a proper negative, and an averment of the *scienter*.

In regard to the representation as to the title, we are of opinion that the indictment is defective in failing to allege that the defendant knew that he had no title to the land at the time he represented himself to be seized in fee. The defendant's knowledge of the falsity of the pretense is material, and must always be averred unless the pretenses are of such a character as to exclude the possibility of the defendant not knowing of their falsity. 2 Wharton's Crim. Law, § 2159. Whether a party has, in a given case, a title in fee to land, is a matter about which there may be a difference of opinion, even among those most conversant with such subjects. Now, an opinion, a mere opinion, however false, is not a false pretense. 2 Bishop's Crim. Law, (Ed. 1865,) §§ 431, 433. It is especially necessary, therefore, when the pleader undertakes to negative a representation as to the title to land, to add the *scienter*.

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Nor can the allegation of the defendant's knowledge of the falsity of his representations as to the title be dispensed with by reason of the use of the word "designedly" in the indictment. On the same principle it might be contended that the use of the words "feloniously and falsely" would dispense with the necessity of any negative. The word "designedly" should always be used, and the *scienter* should be averred in the cases we have named. 2 Wharton's Crim. Law, (Ed. 1874.) §§ 2144, 2159. The judgment is affirmed. All concur.

AFFIRMED.

NORTON V. THOMPSON, *et al.*, Appellants.

1. **Administration of Estate of a Married Minor:** RIGHTS OF THE WIDOW: GUARDIAN. Under the Revised Statutes of 1855, when a minor having a guardian died, leaving a widow, his personal estate was not to be distributed by the guardian under the orders of the probate court, as provided by section 34, page 829. That section, though broad enough in its terms to include all minors, is held to refer only to such as died unmarried. If the minor was a married man, letters of administration had to be granted, and his estate distributed according to the administration law. The widow was entitled to dower in her husband's personal estate, and allowance of money or necessities for the support of the family, the same as other widows. If the guardian, proceeding under section 34, settled the estate and distributed the personalty among the husband's next of kin, such settlement was a nullity as against her, and she might maintain an action against the distributees to recover her share.
2. ———: ———: STATUTE OF LIMITATIONS: MARRIED WOMAN. Where the widow of a minor, who died under guardianship, had re-married before the guardian made his final settlement, an action brought by her and her second husband, seven years after the settlement, to recover her share of her first husband's personal property from his next of kin, to whom the guardian had distributed it under the order of the probate court, in supposed compliance with section 34, page 829, Revised Statutes 1855, was not barred by the statute of limitation, although eleven years had elapsed since the first husband's death.

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*Appeal from Caldwell Circuit Court.*—HON. E. J. BROADBUSH,  
Judge.

*Crosby Johnson* for appellants, argued that the circuit court erred in holding that the judgment of the probate court could be collaterally impeached by awarding to the widow what had been adjudged to the heirs, citing *State v. Todd*, 57 Mo. 217; *Lewis v. Williams*, 54 Mo. 200; *Brent v. Grace*, 30 Mo. 253; *Mitchell v. Williams*, 27 Mo. 399; *Picot v. Bates*, 47 Mo. 390; *Acock v. Acock*, 57 Mo. 154; *Dilworth v. Rice*, 48 Mo. 124; *Henderson v. Henderson*, 55 Mo. 535; *Freeland v. Wilson*, 18 Mo. 380; *Bigelow on Estoppel*, 159, 160; *Loring v. Steineman*, 1 Met. (Mass.) 204; *Greenabaum v. Elliott*, 60 Mo. 25; *Townsend v. Townsend*, 60 Mo. 246; *Patee v. Mowry*, 59 Mo. 161; *Aurora City v. West*, 7 Wall. 82; *Hickerson v. Mexico*, 58 Mo. 61; *Taylor v. Hunt*, 34 Mo. 207; also in holding that the widow was entitled to one-half of the personal estate as dower, although she had not made or filed an election as required by the statute, citing Rev. Stat. 1855, §§ 5, 8, 10, p. 669; *Bryant v. Christian*, 58 Mo. 98; *Price v. Woodford*, 43 Mo. 247; *Ewing v. Ewing*, 44 Mo. 23; also in holding that the widow was entitled to her absolute property out of the estate, notwithstanding she made no application therefor until long after the estate had, under the order of the probate court, been distributed, citing Rev. Stat. 1855, §§ 33, 34, p. 134; also in holding that the statute of limitations was not a bar to plaintiffs' cause of action, citing *Easton v. McAllister*, 1 Mo. 662; Rev. Stat. 1855, §§ 30 to 34, pp. 133, 134; *Hastings v. Meyers*, 21 Mo. 519; *Bryant v. McCune*, 49 Mo. 546; *Cummings*, 51 Mo. 261; *George v. Dawson*, 18 Mo. 407; *State v. Thornton*, 56 Mo. 325; *State v. Matson*, 44 Mo. 305; *Johnson v. Smith*, 27 Mo. 591; *State v. Willi*, 46 Mo. 236; also in rendering judgment against the defendants severally requiring them to pay over a certain proportion of the sums received by them. If the petition had sought to charge defendants severally, it would

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have been demurrable. As it was originally framed, the assault on the order of distribution was the bond of unity, and made all the parties named as defendants necessary and proper parties, but the moment that feature was abandoned the unity was gone, the actions were several, and the judgment became erroneous.

*C. S. McLaughlin* for respondents.

1. The statute of limitations could not commence running against the demand of the widow at all until the final settlement, which was made in 1866, and she being a married woman at that time, limitation was no bar.

2. The cause of action did not accrue to any person who had capacity to sue until an administrator of Joseph Thompson, the deceased distributee, had been appointed. *Dillon v. Bates*, 39 Mo. 292; *Reilly v. Chouquette*, 18 Mo. 220; Angell on Lim., (5 Ed.) p. 45.

3. This action was properly brought. 39 Mo. 301. Under section 5 of the dower act the wife was entitled to one-half of all of the personal estate belonging to Joseph Thompson. She was also entitled to \$200 as her absolute property. Under sections 9 and 10 of the dower act, she was not required to make her election until letters of administration had been granted. The defendants obtained possession of plaintiff's money either through mistake or fraud, and in either event would be treated as trustees holding the money in trust for the plaintiff. If the court erred in dismissing as to Richard Thompson, former curator, this error cannot be taken advantage of, under our statute of jeofails, after judgment rendered.

NAPTON, J.—The facts of this case are somewhat anomalous, and present questions which this court has not heretofore had occasion to examine.

In 1861, a lady, whose maiden name is not stated in the record, was married to a young man named Joseph

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Thompson, who was a minor at the time of the marriage, and whose estate was under the curatorship of R. S. Thompson. In 1862 the husband died, being still in his minority, leaving no children and no debts. In 1864 the widow married Wm. Norton, who, along with his wife, are plaintiffs in this case. In 1866 the curator made a settlement of his curatorship before the proper court, reporting a balance on hand of \$351.84, and by order of the court, he distributed this sum among the heirs of his deceased ward, who were his mother, brothers and sisters, and who are defendants in this action. This suit was commenced in 1873, and seems to have had in view, originally, the annulment of this settlement in 1866, on the ground of fraud, but ultimately the case was dismissed as to the curator—an agreement was made between the parties that there was no fraud—and the plaintiffs claimed merely a right to recover from the defendants money had and received by them, to which the plaintiff, Wm. Norton, was entitled. The plaintiffs obtained a judgment for a sum equal to the \$200 allowed her by the administration law and one-half of the remainder of the personalty claimed under the dower law, or in other words, \$275.92 of the \$351.84 which had been distributed among the defendants as heirs of Joseph Thompson.

The apparent hardship of a decision of this case, one way or the other, is traceable, in our opinion, to a misconception of the 34th section of the act concerning guardians and curators; (Rev. Stat. 1855, p. 829): a misconception, which seems to have been adopted quite naturally by the probate court and the curator, and acquiesced in by all parties concerned. That section provides that "*whenever a minor, having a guardian or curator, dies possessed of property, real or personal, no letters of administration shall be granted on such estate, except as provided in the next succeeding section, (which is, where the minor leaves debts or a will,) but the county court shall proceed to distribute the personal*

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rights of the widow:  
guardian.

estate among those interested by ordering the same to be paid over by the guardian or curator to the distributees." Was this section designed to include a minor who was a married man? Its terms are unquestionably broad enough to embrace all minors, married or unmarried, but it will be apparent on an examination of other statutes in the same code, that if the section is held to include married minors we must conclude that the Legislature intended either to prohibit or ignore all marriages of males under 21, or to debar the widow of a minor from any dower in personalty, and deprive her of the benefit of all provisions made for the benefit of widows generally in the administration law.

Our statute concerning marriages concedes the validity of marriages between minors, when made with the consent of parents or guardians. Whether they would not be valid without such consent is a question not necessary to be discussed, since the marriage in this case is admitted to have been a valid one. It does not appear from the record what was the age of either party, except that the husband was under 21. We may assume that the 34th section of this act concerning guardians and curators did not intend to prohibit the marriage of a male minor.

Let us then examine the provisions in the dower law, and see what provision is made for his wife, in case of his death whilst still a minor. The 1st section declares that every widow shall be endowed of a third part of her husband's real estate for life. The 5th and 7th sections provide that when the husband dies without children, the widow shall be entitled to one-half of the husband's real and personal estate, absolutely, subject to debts, and the 8th section requires the widow in cases of this sort to make her election, whether she will take, under the 1st section, discharged of debts, or under the 5th section, subject to debts. The 9th and 10th sections then point out how this election is to be made, and are as follows: "Section 9. When a widow shall be entitled to dower, as provided by the four preceding sections of this act, it shall be the duty



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of the county court of the proper county, *when letters testamentary or of administration have been granted*, to cause a notice to be served on such widow, apprising her of her right, and requiring her to file her declaration within the time and according to the provisions of the next succeeding section. Section 10. Such election shall be made by declaration, in writing, acknowledged before some officer authorized to take the acknowledgment of deeds, and filed in the office of the clerk of the court *in which letters testamentary or of administration shall have been granted*, within twelve months after the grant of the same; otherwise, she shall be endowed under the provisions of the 1st, 2d and 3d sections of this act." Now, it is apparent, that if the 34th section of the act concerning guardians and curators is held to include married minors, then no such election can be made by the widow, for, in the first place, the notice which the county court is required to give her could not be given, as such notice is not required until letters of administration are taken out, and the 34th section prohibits such letters, and in the next place, it would be impossible for the widow to file her election, as she is not required to do so until a year after the grant of letters of administration, and the 34th section prohibits such letters from being granted.

Again, it is in the statute concerning administrators and executors that we find various provisions for the benefit of widows. The 2d article of this act is entitled, "of their duties respecting money and property," and in this chapter there are five sections (30 to 34, both inclusive,) giving directions to administrators as to the property or money, or both, to be allowed a widow. The 30th section allows her a specified amount of books, clothing, looms, yarn, grain, groceries, furniture, &c., and the next section directs the county court, in the absence of certain provisions deemed necessary for the support of the family for twelve months, to appropriate sufficient money out of the assets of the estate to purchase such supplies. Section 33 then allows

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the widow to select, in addition to that already given her, two hundred dollars worth of property, or if the property is sold or distributed, that amount of money. Section 34 provides that "if the widow do not receive the property thus allowed her, and the same be *sold by the executor or administrator*, the county court shall order the money to be paid to the widow at any time before the same be paid out for debts or distributed." All these provisions of the act for the benefit of the widow are plainly based on the assumption of an administration. They are contained in an act specially devoted to that subject. Was it the intention of the Legislature that where the husband dies before attaining 21 years, his widow is to be deprived of these allowances, which, beyond question, all other widows are entitled to? We are unable to conjecture any motive for such a discrimination. Yet, if section 34 of the act concerning guardians and curators was intended to apply to married minors, the result is unavoidable that the widow, in such cases, is deprived, not only of dower in the personalty, but of the \$200 provided for her in the administration law.

In view, then, of these statutes—that concerning dower, that concerning administration—the law concerning marriages, and indeed, the general policy of the Legislature as indicated in these and other statutes, we are constrained to the conclusion that this 34th section heretofore referred to must have a restricted interpretation—must be confined to unmarried minors. It is then quite a reasonable provision, and the word *distributees* used in it evidently means simply and solely the heirs at law of the deceased minor, and has no reference whatever to the widow of a minor. The proceeding in the county court by the curator was, therefore, a mere nullity, so far as Mrs. Thompson was concerned. It was not a final settlement of an administrator, which she was bound to notice, but a settlement of a curator under a section of the statute which had no application to the case.

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The statute of limitations was no bar to the present suit, as the widow of Thompson was married in 1866, when her cause of action first accrued. Previous to that the curator did not hold the property adversely, but simply as a trustee for the parties interested in the administration of the estate. Regularly, the plaintiffs should have had an administrator appointed, but the result would have been the same reached by the circuit court in this action against the distributees of Thompson, and to save a further accumulation of costs the judgment of the circuit court will be affirmed. The other judges concur.

AFFIRMED.

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THE STATE, *Appellant*, v. EADES.

**Forgery of Municipal Obligations:** ELEMENTS OF THE CRIME. It is not essential to the crime of forgery that the person in whose name the instrument purports to be made, shall have legal capacity to make it. It is sufficient, under Wag. Stat., sec. 16, p. 470, if it is made with intent to defraud, and on its face would be likely to defraud. Thus, the making a false municipal certificate of indebtedness with intent to injure or defraud, is forgery, notwithstanding the municipality may have no power to issue such certificates.

*Appeal from Jackson Criminal Court.*—HON. H. P. WHITE, Judge.

*J. L. Smith*, Attorney-General, for the State.

Even if the city could successfully defend an action brought to enforce collection of this certificate on the ground that it was issued without authority, it does not follow that it is not an instrument calculated on its face to deceive any one to whom it might be offered. Our statute is very comprehensive, and includes every instrument or

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writing whereby a pecuniary obligation purports to be created. It does not make it a condition precedent that the person or corporation who appears to have made it, should have had the power to make it.

*Tichenor & Warner* for respondent.

NORTON, J.—Defendant was indicted in the criminal court of Jackson county at its November term, 1874, for forgery. The indictment contains five counts, in some of which defendant is charged with forgery, and in others with uttering the following certificate of indebtedness of the City of Kansas :

*Certificate of Indebtedness of the City of Kansas.*

STATE OF MISSOURI, }  
County of Jackson, } ss. \$150. No. 1792.

This is to certify that the City of Kansas is indebted to John Halpin in the sum of one hundred and fifty dollars, due and payable October 1st 1873, with interest at the rate of ten per cent. per annum from July 10th, 1872. Said indebtedness having accrued on account of the Bluff street bridge.

By order of the Common Council.

Approved July 8th, 1872.

HENRY C. KUMPF,  
Auditor.

R. H. HUNT,  
Mayor.

Defendant filed his motion to quash the indictment, which was sustained, and the State brings the case here by appeal. The reasons alleged in the motion to quash are that the crime of forgery is not charged, that the instrument of writing set out is not such as the crime of forgery can be committed of, and that there is no allegation that it is of any value. No brief having been filed by the respondent, we are left to ascertain the specific grounds relied upon to support the objections made.

The indictment is framed on Wag. Stat., sec. 16, p. 470, which is as follows: "Every person who, with intent to

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The State v. Eades.

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injure or defraud, shall falsely make, alter, forge or counterfeit any instrument or writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be, or purport to be transferred, created, increased, discharged or diminished, or by which any rights or property whatever shall be, or purport to be transferred, conveyed, discharged, increased, or in any manner affected,

\* \* shall, on conviction, be adjudged guilty of forgery in the third degree."

The indictment formally charges the offense as defined by this section, and is in conformity with approved precedents. Whar. Prec., 264. It is, however, claimed that the instrument set out therein is not such as can be the subject of forgery, because the charter of the City of Kansas does not confer on the mayor and common council the power to issue the same. Section 16, *supra*, is broad and sweeping in its definition of this grade of forgery, and would seem to embrace, as the subject of it, every false writing made with intent to defraud or injure, which, on its face, would be likely to defraud.

Upon a statute of New York, similar to our own, which came before the court for construction in the case of the *People v. Krummer*, 4 Park. C. R. 217, it was held that "we are never called upon to determine whether in legal construction the false instrument or writing is an instrument of a particular name or character. It is a matter of perfect indifference whether it possesses or not the legal requisites of a bill of exchange, or an order for the payment of money or the delivery of property. The question is whether, on its face, it will have the effect to defraud those who may act on it as genuine, or the person whose name is forged. It is not essential that the person, in whose name it purports to be made, should have the legal capacity to make it, nor that the person to whom it is directed be bound to act upon it, as genuine, or have a remedy over. Though all the parties to a bill of exchange are purely fictitious, if it be passed as genuine, it is regarded by the

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The State v. O'Brian.

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law as forgery. The law looks only to the falsity of the instrument and the fraudulent use of it as genuine."

Authorities are to be found in support of the proposition maintained by defendant, among which may be cited *Clinch's* case, 2 East's Pleas 938, and *People v. Wright*, 9 Wend. 193. It was, however, observed in the former case that "if the writing purport to be an order which the party has a right to make, although in truth he had no such right, and although no such person existed in fact as the order purports to be made by, it falls within the penalty of the act;" and the latter case, *People v. Wright*, has been criticised, if not overruled, in the case of *People v. Stearns*, 21 Wend. 409.

While conceding that there is a conflict of authority on the question presented, we are disposed to follow the principle announced in the case of *People v. Krummer*, *supra*, as reflecting the spirit and meaning of the statute as to the class of writings which, under it, are the subjects of forgery, and applying the test there laid down to the indictment in question, it is sufficient to require defendant to answer it. Judgment reversed and cause remanded, with the concurrence of the other judges.

REVERSED.

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THE STATE, *Appellant*, v. O'BRIAN.

**The Cass County Probate and Criminal Court** never had any existence. There could not, therefore, be a judge of such court either *de jure* or *de facto*. An indictment presented to a person assuming to act as such judge is *coram non iudice* and void, (following *Ex parte Snyder*, 64 Mo. 59).

*Appeal from Johnson Criminal Court.*—HON. WM. H. H. HILL,  
Judge.



At the August term, 1875, of the Cass county probate and criminal court, the defendant was indicted for grand larceny. On his application the venue of the cause was changed to the criminal court of the sixth judicial circuit and the county of Johnson, within and for Johnson county. At the December term, 1875, of said last mentioned court, the defendant demurred to said indictment, alleging as cause of demurrer, that "the criminal and probate court of Cass county, in which said indictment was found, is unauthorized by law, and has no legal existence, and all its proceedings, whereby said indictment was presented, are null and void." The court below sustained this demurrer and the case is brought here, by the State, by appeal.

*J. L. Smith*, Attorney-General, for the State.

*Adams & Sherlock* for respondent.

HENRY, J.—The questions presented for determination by this record are identical with those involved in the case of *Ex parte Babe Snyder*, 64 Mo. 59. That was, as this is, a criminal cause, and the party who was serving out a term in the penitentiary under a sentence of the court, instituted proceedings in order to get relief, directly questioning the existence of the court. We held that, as there never was such a court established in Cass county, there could not be a judge of such court either *de jure* or *de facto*. The doctrine held by the court in the Snyder case is decisive of this, and the judgment of the criminal court quashing the indictment is affirmed. All concur.

AFFIRMED.

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Drowry v. Bauer.

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DROWRY V. BAUER, *Appellant*.

**Widow's Allowance of Personalty cannot be taken out of Proceeds of Real Estate.** If a widow postpones her application for the allowance of personalty out of her deceased husband's estate, to which she is entitled under Wag. Stat., sec. 35, p. 88, until after the administrator has used the personalty in payment of debts, she loses her right, and her loss will not be made good to her out of the proceeds of real estate subsequently sold to pay the remainder of the debts.

*Appeal from Osage Circuit Court.*—HON. A. J. SEAY, Judge.

*Ewing & Pope* for appellant.

*Lay & Belch* with *C. G. Clement* for respondents.

SHERWOOD, C. J.—John Bauer died and his widow administered upon his estate. Owing to her marriage with her co-plaintiff, Wm. Drowry, her letters became revoked. Thereupon, she made settlement of the estate, showing the sum of \$203.26 in her hands, arising from the sale of personal estate. The then administrator *de bonis non*, Adam Bauer, received that sum and applied it to the payment of classified debts, prior to February, 1871. Adam Bauer resigned his letters in 1873. The present defendant becoming his successor, administered upon the estate, and in due course of administration sold real estate from the proceeds whereof, there will be, after payment of all debts, \$700. The widow, Mary T., prior to the settlement with the county court had received under Wag. Stat., sec. 35, p. 85, vol. 1, \$228 in personal property. The present proceeding was instituted in 1874 to obtain the residue of the \$400 allowed under the provisions of section 35, *supra*, and certain declarations of law denying her right of recovery, under the above noted circumstances, were refused the defendant, and this presents the only question for solution.

The right of the widow, in such cases, is purely statutory, and is, therefore, to be governed and determined by the rules and conditions which the statute itself prescribes.

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The State v. Duckworth.

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Those rules will be found laid down in sections 36 and 37 immediately succeeding section 35, which confers the right to property of the description therein mentioned. Section 36 provides that the widow "shall apply for such property \* \* before the same shall be distributed or sold." And section 37 says that: "If the widow do not receive the property thus allowed her, and the same be sold by the executor or administrator, the court shall order the money to be paid to the widow *at any time before the same be paid out for debts or be distributed.*" It is thus plain to be seen that if we obey the behests of the statute, the application of the widow came too late, and should have been rejected. Nor is her *status* altered, or in the least bettered, because the administrator had a surplus of money in his hands arising from the sale of real estate. That money belongs to the heirs; and she, having failed to make application in the time she was told by the law to apply, cannot now make her loss good in violation of the statute and of the vested rights of others. These considerations induce the reversal of the judgment. All concur.

REVERSED.

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THE STATE V. DUCKWORTH *et al.*, Plaintiffs in Error.

**A Bill of Exceptions**, filed after the term, will not be considered, unless it appears by an entry of record that the opposing party consented to the filing. An entry showing merely that he was present when the court gave the appellant leave to file it out of time, is not sufficient; nor will the defect be cured by an entry subsequently made by the clerk in vacation reciting that consent was given.

*Error to Henry Circuit Court.*—HON. FOSTER P. WRIGHT,  
Judge.

*F. E. Savage* for plaintiffs in error.

*J. L. Smith*, Attorney-General, for the State.

NORTON, J.—Defendants were tried at the April term, 1878, of the circuit court of Henry county, upon a charge of grand larceny, of which they were convicted. The cause is before us on writ of error, and we are asked to review alleged errors of the trial court in allowing the State to assail the character of defendants, each of them having testified in his own behalf, and in giving a written instruction to the jury, in the absence of defendants and their counsel, after they had retired to consider their verdict. Neither of these alleged errors can be considered, because no bill of exceptions was filed during the term at which the trial was had, and there is no record entry showing that consent of the opposing party was given to file the same out of time. The only record entry upon this subject is as follows: "Now, at this day, comes Clement C. Dickinson, prosecuting attorney of Henry county, who prosecutes herein for the State of Missouri, and also the defendants by their attorney, and upon the application of said defendants leave is granted by the court to said defendants to file bill of exceptions in said cause within 30 days." It does not appear from this entry that the prosecuting attorney consented thereto, and under the authority of the following cases it was not only necessary that consent should be given, but that the record should show that it was given. *Ruble v. Thomasson*, 20 Mo. 263; *West v. Fowler*, 55 Mo. 300; *West v. Fowler*, 59 Mo. 40.

The omission to state in the record entry made by the court that the prosecuting attorney consented that the bill might be filed out of term, is not cured by the statement made by the clerk in vacation. That statement is as follows: "And afterwards, to-wit, on the 22d day of May, in vacation 1878, came again defendants in vacation, by their attorney, leave having heretofore been granted by the court with and by the consent of C. C. Dickinson, prose-

cuting attorney as aforesaid, and files in the office of the circuit clerk bill of exceptions." It was for the court (and not the clerk) to say, when the order was made granting the leave, whether the prosecuting attorney consented thereto. Therefore, all that is stated by the clerk outside of the facts that the bill of exceptions was filed in his office, and the time when it was done, is a mere nullity. To recognize the doctrine that the clerk might, in vacation, assume the duty of the court, and supply an omission in an order, would be establishing a principle destructive to the interests of litigants, and productive of the utmost confusion. Judgment affirmed with the concurrence of the other judges.

AFFIRMED.

DEGRAW V. PRIOR, *Appellant*.

1. **Forcible Entry and Detainer**: PARTIES DEFENDANT: AGENT. A writ of restitution in an action of forcible entry and detainer, will not necessarily be unavailing because the persons who were living upon the land at the institution of the suit were not made defendants. If they were the servants of the person who was made defendant, they can be dispossessed under the writ; and the fact that the defendant does not live in the county where the land lies does not alter the case.
2. UPON an examination of the testimony offered by the plaintiff to prove that he was in possession at the time of the forcible entry complained of, the court is of opinion that it is ample to sustain the verdict, which was rendered in favor of the plaintiff.

*Appeal from Carroll Circuit Court.*—HON. E. J. BROADDUS,  
Judge.

*R. D. Ray* for appellant.

*L. H. Waters* for respondent.

HOUGH, J.—But two questions were pressed upon our

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DeGraw v. Prior.

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attention at the argument of this case. *First*, Was there any evidence tending to show that at the time of the forcible entry complained of, the plaintiff had such possession of the premises claimed as would enable him to maintain the present action? *Second*, Was there any testimony tending to show that at the institution of this suit the defendant was in the actual possession of the premises?

The forcible entry occurred in November, 1868, and this suit was instituted in May, 1869. The question of the defendant's possession, at the institution of the suit, was submitted to the jury under instructions given at his own instance, and their finding is supported by testimony which tended to show that he was, himself, in the actual possession of the premises in dispute sometime in the spring of 1869, and that when he was not personally there during that spring, his servants were. Whether he was there as the agent of his son, for whom he had bought a tax title to the land, or in his own behalf, and whether the servants employed in taking possession and making the improvements were the servants of the defendant, or the servants of his son, were questions which were properly submitted to the jury. It has been very persistently urged that the judgment should be reversed for the reason that a writ against the defendant would be unavailing, inasmuch as he was not living on the land at the institution of the suit, and the persons who were there at that time have not been made defendants herein. Whether other persons who were on the land at the institution of this suit, and who were not made defendants, can be turned out under a writ of restitution against Prior, will depend altogether upon whether such persons were the servants of Prior. If they were, they undoubtedly can be, otherwise they cannot. We do not understand it to be the law that every domestic and day laborer who may be living upon premises in possession of a defendant in an action of ejectment, or unlawful detainer, must be sued in order to make a writ of possession or of restitution against him effectual; nor do



we understand it to be the law that a man who lives in one county cannot be in the actual possession of land by his servants in another county.

We will now consider the plaintiff's possession. In December, 1867, the plaintiff, claiming title under a conveyance read in evidence, employed one Hill to take possession and plow a portion of the land in controversy, during the following season. Hill did not commence plowing until July, 1868, and finding the ground to be very dry and hard, quit after plowing 125 square rods on the land sued for, with the intention, as he stated, of resuming work as soon as the ground should be fit. After this plowing was done, and before defendant entered, plaintiff employed Hill to fence and break up forty acres of the tract. Hill went upon the land in the fall of 1868, to resume the plowing, and found a shanty built by one Dulaney, for the defendant. Hill got out some rails but none were ever hauled upon the land. These facts, it was declared by this court, when this case was here before, (60 Mo. 59,) constituted such possession as entitled the plaintiff to maintain this action. In May, 1868, plaintiff, by contract in writing, sold the land in controversy, viz: the southwest quarter of section 9, township 55, range 22, and the east half of said section to F. D. & C. Webster, for \$1,100 cash, \$1,100 payable on or before December 1st, 1869, and \$1,100 on or before December 1st, 1870, and bound himself to make to said Websters a warranty deed when the deferred payments were made.

The plaintiff testified as follows: "I claimed the land in question, and my purpose in making said contract with Hill to do said plowing was to make a farm on said land;

\* \* I claimed to be in possession when the shanty was built on the land by Dulaney in November of that year; I did not put the Websters in possession under said contract or title bond; the breaking or plowing done by Hill on the land in suit, was done in July after the title bond was made; in the spring of 1869, or about

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the 1st of May of that year, the Websters took possession of the two other quarter sections embraced in said title bond; the Websters are entitled to the possession of the quarter section in suit if I gain it. Cross examined: When I made the title bond to the Websters I told them to go on the land; I also told them about my contract with Hill about the plowing, and that said plowing would inure to their benefit; when I made the title bond to the Websters they went away, and I told them they could go on the land when they returned; they came back that year or the next; I did not see them until May or June, 1869; they had been here a short time before I saw them, and had made some improvements on the northeast quarter of southeast quarter of said section under said title bond, or were about to commence some. Re-examined: I told the Websters, when I sold to them, that Hill was to plow ten acres and farm forty acres on the land in suit; the Websters never had possession of the land in question."

Dulaney testified that the northeast quarter and the southeast quarter were vacant when he built the house for the defendant, Prior, on the southwest quarter; that he knew the Websters, and that they came to the neighborhood between the 1st and 15th of May, 1869. One of defendant's witnesses testified that Hill, when he was doing the plowing on the land in suit, said "that he came to take possession for DeGraw; that DeGraw had sold to the Websters, and that there was some other claim and he wanted to get possession." The foregoing is the evidence bearing upon the question of the plaintiff's possession, and it is contended by the defendant that it does not tend to show that the plaintiff was in possession when the forcible entry occurred. It is further contended that the Websters should have brought this action and not DeGraw; that at the time Prior entered, the Websters, and not DeGraw, had the actual possession of the land. This argument is based solely upon the statement made by DeGraw, that he told the Websters to go on the land, and that the contract with

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Moffatt v. Montgomery.

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Hill for the plowing would inure to their benefit, and it ignores all the other testimony on the subject. It rejects the subsequent statement made by the plaintiff that he told the Websters to go on the land when they returned; and the fact that they returned in the spring of 1869, long after the entry of the defendant. These facts are all entirely consistent, and they corroborate the further statement of the plaintiff that the Websters never were in possession of the land in suit. When they returned and took possession of the east half of the section in the spring of 1869, Prior was in possession of the southwest quarter. It is clear that they were not in the actual possession of the land sued for when Prior entered, by reason of any act done by themselves, and it has been heretofore ruled (60 Mo. 56) that the title bond itself did not give them the possession. We think the testimony is amply sufficient to sustain the verdict, and the judgment will, therefore, be affirmed. All concur.

AFFIRMED.

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MOFFATT V. MONTGOMERY, *Appellant*.

**Contested Election:** NOTICE OF CONTEST: BLANK BALLOTS. When an election is contested on the ground that blank ballots have been counted in favor of the contestee, the notice of contest need not state the names of the voters who cast the blanks. Wag. Stat., sec. 54, p. 573, requiring the names of all voters objected to, to be stated in the notice, does not apply, since the objection is not to the voters, but to the action of the officers of election in counting blanks as votes.

*Appeal from McDonald Circuit Court*—HON. JOSEPH CRAVENS,  
Judge.

C. W. Thrasher and H. C. Young for appellant.

*George Hubbert and E. L. Edwards & Son* for respondent.

NORTON, J.—The principal question presented in this case is, as to the sufficiency of the notice contesting the election of defendant to the office of collector of McDonald county, at the general election held in that county in November, 1876. The point raised as to the timeliness of the notice and its proper service is not well taken. The notice was given in conformity to the following statutory provisions, Wag. Stat., sec. 17, p. 442; Wag. Stat., sections 50, 52, 54, 57, p. 573; Wag. Stat., sec. 25, p. 569.

It is claimed, however, by defendant, that it is defective and insufficient because it does not specify the name of any voter objected to, or the name of any voters whose votes are objected to by contestant, or any objection to any specified voter; and because it does not designate the specific grounds upon which plaintiff relies in his said contest. Wag. Stat., sec. 54, p. 573, requires that the party contesting an election, shall specify in the notice of contest "the grounds upon which he relies, the name of all voters objected to, with the objections." It will be observed by reference to the notice that no voter is objected to, and under the statute it is only necessary to give the name of the voter with the objections to his vote, when such voter is objected to. If other grounds of contest exist than may be founded on an objection to a voter, such ground must be stated. We think the notice in question does this in unmistakable language. It is alleged therein that in the election district or township of Buffalo, fifteen ballots were falsely and fraudulently counted and certified by the election officers, and counted by the canvassers for the defendant, which had not been cast for him, but which as to him and said office were blank; that in Richmond district seventy-five ballots were falsely and fraudulently counted and certified by the election officers, and counted by the canvassers for defendant, when in fact,

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said ballots were not so cast and voted for defendant, but as to said office and the name of defendant as a person designated to fill the same, were wholly and utterly blank, that the rejection of these ballots from the count would elect plaintiff to said office by a majority of 80 votes.

The ground of contest is not based upon an objection to any vote actually cast, or any voter casting a vote, but upon the facts that votes not cast were counted, and that blank ballots and not votes were returned and canvassed for defendant; hence it was wholly unnecessary to give the name of any voter. In trying this issue what purpose could have been served by giving the names of the voters casting these blank ballots? They would not have been allowed to testify at the trial and make that a vote which was not a vote when cast. Upon a re-count in the trial court of the ballots from said township of Richmond and Buffalo, it was shown that in the former defendant did not receive any votes, and in the latter only twenty-two instead of thirty-nine, thus electing plaintiff by a majority of seventy-three votes. The judgment being for the right party, and no error being perceived, it will be affirmed. All the other judges concur.

AFFIRMED.

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WALBRUNN *et al.*, Appellants, v. BALLEEN.

1. **Mistaken Possession, when Adverse.** If one takes possession of the land of another, believing and claiming it to be his own, his possession is adverse. It is only where he occupies by mistake and with no intention of claiming any thing which does not belong to him, that it is not adverse. See *Houx v. Balteen*, *ante*, p. 84.
2. **Adverse Possession: PROPOSAL TO BUY CONFLICTING CLAIM.** A proposal from one in the possession of land to buy out the holder of the true title, does not necessarily amount to a recognition of this title, or an acknowledgment that the possession is not adverse.

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 Walbrunn v. Ballen.
 

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*Appeal from Livingston Circuit Court.*—HON. E. J. BROAD-  
DUS, Judge.

*H. M. Pollard* for appellants.

HENRY, J.—This was an action of ejectment commenced by Walbrunn et al., on the 2d day of September 1875, against William Ballen for the northwest quarter of the northwest quarter of section 24, township 56, range 23, in Livingston county. Defendant denied that he had, or ever had, possession of any part of said tract of land except 15 44-100 acres lying in the northwestern corner of said tract; and disclaiming any title to the balance, pleads the statute of limitations as to said 15 44-100 acres. Plaintiffs' evidence tended to show title in themselves to the whole tract. Defendant's evidence tended to show that he had been in possession of the fifteen acres since the spring of 1864, and that he had fenced and cultivated the same, and that such possession was open, notorious, adverse and hostile. Defendant testified that, in January, 1864, he bought and received a deed to a forty acre tract, which he supposed at the time was the tract in dispute, but which was in fact a different forty; that so believing, he took possession of the forty in dispute, made the improvements above specified, and did not discover his mistake until July, 1873, when he went to one Sanders to get an abstract of the title for the purpose of executing a mortgage, when he ascertained that he had no title to the forty in controversy, but that plaintiff owned it, and he thereupon mortgaged the forty which he did own. No change of possession occurred after this discovery, but defendant continued in possession as before.

Plaintiffs asked the court to declare that, having taken possession under the circumstances testified to by defendant, his possession was not adverse and hostile, which the court refused. They rely in support of the doctrine of that refused instruction upon the followi..g

1. MISTAKEN POS-  
SESSION. WHEN  
ADVERSE.



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cases: *Knowlton v. Smith*, 36 Mo. 507; *Kincaid v. Dormey*, 47 Mo. 337; *St. Louis University v. McCune*, 28 Mo. 483; *Thomas et al., v. Babb et al.*, 45 Mo. 384. Bliss, J., in the last case cited, states very clearly the doctrine of those cases. "It is not uncommon for adjoining proprietors, in making their division fences, to mistake the true line of division. Sometimes they intend to make the line of the fence the actual boundary of their separate property, claiming and occupying up to it as the individual property of each, and each understanding the character of the claim and occupancy of the other; but, sometimes also, they make the fence as a division of convenience, mistaking or ignoring the true line; or, one of them may make it as part of a necessary inclosure, without intending to claim beyond the true line. In the one case the occupancy would be adverse, in the other it would not."

In *Kincaid v. Dormey*, the same learned judge said: "I find, first, that the court gave the correct doctrine upon the question of adverse possession in holding, by mistake, up to a division fence and over the true line, without claiming to own anything more than what is embraced in the true line. The law upon that subject has been so repeatedly declared by this court as to require no further comment;" citing the cases above referred to. In *St. Louis University v. McCune*, 28 Mo. 485, Richardson, J., delivering the opinion of the court, said: "If the plaintiffs erected their fence accidentally upon the defendant's land, through mistake or ignorance of the correct line separating the tracts, and without intending to claim beyond their true line, then the line of occupation thus taken, and the possession that followed it, did not work a disseisin." The doctrine deducible from these utterances of this court is, that if one by mistake inclose the land of another, and claim it as his own, his actual possession will work a disseisin; but if, ignorant of the boundary line, he makes a mistake in laying his fence, making no claim, however, to the land up to the fence, but only to the true line as it may

Walbrunn v. Bailen.

be subsequently ascertained, and it turns out that he has inclosed the land of the adjoining proprietor, his possession of that land is not adverse. *Tamm v. Kellogg*, 49 Mo. 122; *Hamilton v. West*, 63 Mo. 93.

If this be the correct doctrine, that of the refused instruction is not. Here the defendant, by mistake it is true, took possession of the land belonging to the plaintiffs. He claimed it as his own. He had no thought of yielding possession to a true owner, if it was not his land. He had no doubt that it was his, and he took possession under no other view than that it was his. It cannot be said that he intended to take and hold the land until it should be determined or ascertained whether it was his or not. No such thought was in his mind. He had but one thought, that it was his land, and he would take possession of it and make his improvements.

Danl. Walbrunn, one of the plaintiffs, testified that, in the fall of 1873, Mr. Sanders informed him that defendant was in possession of his land; that soon thereafter, in the same fall, he saw defendant on the street near the store of witness, and said to him: "I hear you are in possession of my land. He said he was—that he had learned from Mr. Sanders that witness owned it. Witness then told him he would sell it to him, and defendant asked what will you take for it? Witness answered \$18 per acre. Defendant then replied: "I haven't the money to buy with; I had rather sell my forty." Defendant, in his testimony, said he had no recollection of a conversation between him and Danl. Walbrunn prior to 1875, and that he never, at any time, proposed to Walbrunn to buy the land.

Plaintiff asked the court to give the following instruction, which was refused: "If the defendant had no title, or color of title, or claim of right to the land in controversy, but while in possession of said land, and before ten years from the date of this entry had elapsed, and less than ten years before this suit was commenced, he applied to said

2. ADVERSE POSSESSION: proposal to buy conflicting claim.

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plaintiffs to buy said land from them, then such application to purchase was an acknowledgment that he did not hold adversely to plaintiffs." The court, however, gave the following: "If defendant did any act while in possession of the land in dispute showing that he recognized plaintiffs as the true owners, then, from the time of doing such act his adverse possession ceased." "There can be no adverse holding without an intent to hold adversely; and if the defendant did any act before the expiration of ten years from the entry indicating that he recognized the plaintiffs' title, then, and from that time, the statute of limitations ceased to run." The court properly refused the first of the foregoing instructions. A proposition to buy the land by the person in possession, is not necessarily a recognition of the title of the person of whom he proposes to purchase. "To prevent the operation of the statute a parol acknowledgment of the adverse title by the person in possession, must be such as to show that he intends to hold no longer under a claim of right; but declarations made merely with a view to compromise a dispute, are not sufficient." *Angell on Lim.*, 388. It was well enough to leave it to the jury, or the court sitting as such, to determine, from the evidence, whether such a proposition was made, and with what intent; but it would not have been proper, under the circumstances, for the court to declare, as a matter of law, that a proposition by defendant to purchase of plaintiffs was an acknowledgment that he did not hold adversely to them. Besides, the testimony of Danl. Walbrunn did not prove that defendant made a direct proposition to buy, but that Walbrunn proposed to sell the land to defendant, who merely asked his price and declined to purchase. The instructions given properly presented that matter to the court sitting as a jury, and the finding of the facts by the court was warranted by the evidence. The judgment is affirmed, all concurring.

AFFIRMED.

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The Hannibal & St. Joseph Railroad Company v. Green.

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THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY V. GREEN,  
*Appellant.*

1. **Trustee: ESTOPPEL.** One who claims under a deed which was executed by a trustee, and which, by reference, recognizes a plat executed by a predecessor in the same trust, cannot deny that the latter had authority to act as trustee.
2. **Trustee's Deed: CONDITIONS TO EXERCISE OF POWER OF SALE.** A conveyance by the trustee of a land company, who, by the terms of his trust, is required, before selling, to give a bond for the faithful performance of his duties, and to sell according to rules to be prescribed by the company, carries the title to a stranger, although no bond has been given and no rules prescribed.
3. **Trustee's Deed: WHEN IT CONVEYS THE TRUST ESTATE.** Where a person, who was at the same time trustee of a land company with a power of sale, and also a member of the company, and as such beneficially interested in the land, executed a deed in which he described himself as trustee of the company, and the land as part of the town which his trust deed proposed should be laid off on the property of the company, and for a full description referred to a plat of the town then on file; *Held*, that this was sufficient to show that he was executing the deed as trustee, and was not merely conveying his beneficial interest.
4. **Repugnant Descriptions.** Where a deed contains two descriptions of the land conveyed, one general, the other particular, if there is any repugnance the latter will control.
5. **Trust Deed: NOMINAL CONSIDERATION: RAILROAD.** It is no objection to a deed executed by the trustee of a land company, conveying a strip of ground for depot purposes to a railroad company which is building its road through a town laid out on the property of the land company, that the conveyance is made for the consideration of one dollar.
6. **Principal and Agent: RAILROAD.** A railroad company is not responsible for the error in a town plat on which the location of its right of way is incorrectly represented, merely because the persons who prepared and filed it were its engineer and local agent. To make it responsible, there should be proof that these persons were in that respect authorized to act for the company.

*Appeal from Caldwell Circuit Court.*—HON. E. J. BROADDUS,  
Judge.

This was an action of ejectment for a parcel of land

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described in the petition as follows: That part of the southwest quarter of section 13, township 57, range 28, situated and lying within the following boundaries in the town of Hamilton, as described on the plat of said town: beginning on the north line of the right of way of the Hannibal & St. Joseph Railroad where the same is intersected by Burrows street, thence north along said street fifty feet, thence westerly and parallel with said right of way 1,306 feet to the intersection of Frame street, thence south along said street fifty feet to the north line of said right of way of said railroad, thence easterly on the north line of said right of way 1,306 feet to the point of beginning.

In 1855 thirteen persons, among whom was one Albert G. Davis, purchased a tract of land in Caldwell county, embracing the southwest quarter of section 13, township 57, range 28, which was, at their instance, conveyed by Edward M. Samuel, the then owner, to the said Davis, as trustee. Both parties to this action claimed under this deed. The deed declared that it was the intention of the unincorporated company, composed of these thirteen persons, to lay out a town, or towns, on the tract, and that Davis was appointed trustee in order to avoid difficulty in making conveyances in case of death, removal, &c., of any of the parties interested. It invested him with full power and authority, after he should have signified his acceptance of the trust and given a bond in the sum of \$10,000 for its faithful execution, to sell and convey all lots that might be laid off in a town, or towns, the conveyances to be in the name of the Prairie City Town Company, if the town should be laid off on section 15, township 57, (one of the tracts conveyed,) and in the name of the Hamilton Town Company, if the town should be laid off on the southwest quarter section 13, township 57, or on certain other lands described. The southeast quarter section 13, township 57, was not covered by the deed. Provision was made for the appointment of a successor in the trust. It was also provided that the trustee should be governed in the price of

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lots, the terms of payment and the time of selling, by rules to be adopted by a majority of the company, which rules were to be signed by such majority and acknowledged and recorded in Caldwell county. The trustee was to be allowed his expenses and a commission of five per cent. on sales, the net proceeds to be divided among the members of the company.

Davis accepted the trust by an instrument in writing, and in the same, or the following year, laid out the town of Hamilton on the southwest quarter section 13, township 57, and made a plat of the town which was duly signed and acknowledged by him, and was recorded in the recorder's office of Caldwell county. Plaintiff's railroad had already been located at the time this was done. On the 14th day of October, 1859, Davis executed a deed to the plaintiff as follows: Know all men by these presents, that Albert G. Davis and Julia A. Davis, his wife, as trustee of the Hamilton Town Company, of the county of Caldwell, in the State of Missouri, in consideration of the sum of one dollar to them in hand paid by the Hannibal & St. Joseph Railroad Company, in the State aforesaid, have granted, bargained and sold, and do hereby grant, bargain and sell unto the said Hannibal & St. Joseph Railroad Company, their heirs and assigns forever, the following described real estate, to-wit: Two strips or pieces of ground, each fifty feet wide and 1,306 feet long, for depot purposes, extending over, upon and across a part of the tract of ground known as the town of Hamilton, being a part of the southeast quarter of section 13, in township 57, range 28, in Caldwell county, Missouri, beginning at the west side of Burrows street and running to the east side of Frame street, one of said strips being north of and adjoining the tract of ground now occupied by the Hannibal & St. Joseph Railroad Company, a more full description of which said depot grounds will appear by reference to the plat of said town of Hamilton now on file in the recorder's office of said county of Caldwell, to have and to hold the same, &c., &c. This deed



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was immediately recorded. In April, 1860, the records of Caldwell county, including the town plat and the record of this deed, were destroyed by fire. In the same year Davis executed another plat and filed it in the recorder's office for record. In 1866, Thomas W. Higgins having succeeded Davis in his capacity of trustee, conveyed to Ward and Thornton a lot described as "lot one in block twelve in the town of Hamilton, Caldwell county." Ward and Thornton subsequently conveyed to defendant and one Foley.

At the trial, Albert G. Davis being called as a witness on the part of the plaintiff, testified that at the time of and before the execution and filing of the first plat, the plaintiff's railroad had been located 280 feet north of its present location; that said railroad was represented on said plat as being located 280 feet north of its present location, but that the location was afterwards, in the year 1859, changed to its present location, and that the plat which he executed in the year 1860 showed the actual location of the road as constructed; that the second plat was drawn by the engineer of plaintiff from a survey made by its said engineer, and was furnished witness to be executed and filed for record, and that witness, at the time of the execution and filing the second plat, was the railroad agent of plaintiff at Hamilton, and that he filed said plat in the recorder's office of the said county; that by the second plat the railroad was represented as occupying a strip of ground fifty feet wide on the north side of the center line of the railroad as now located, and that no part of lot one in block twelve was within fifty feet of the railroad; and that said lot was represented on the original plat as a full lot forty-four feet wide, and as being wholly outside the limits of the right of way of the railroad, but that he did not remember positively how it was represented on said second plat, although, to the best of his recollection, it was represented on the second plat as a full lot; that the second plat could not be found.

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Joseph Willis testified that a part of the inclosure of lot one in block twelve came within 100 feet of the center line of the railroad. John Smith, a civil engineer, testified that he had made a survey of the premises in controversy, and that a strip of land 100 feet wide, and extending along and from the north side of the center line of the railroad would include a strip of land in block twelve, lot one, twenty-three feet four inches on the west end, and twenty-seven feet five inches on the east end, being on the south side of said lot.

Vincent Bowman testified on the part of the defendant that he had seen said second plat; that the right of way of the railroad where it passed along said lot was thereon designated as being fifty feet wide only, but that he did not remember how said lot was shown, never having examined with reference to it. There were numerous fractional lots along the line of the road as shown by said second plat. Thomas W. Higgins, a witness for defendant, testified that he sold the lot in question to said Thornton and Ward, relying on the statement in said second plat that the plaintiff's right of way only extended fifty feet north of the center line of the road-bed, and that he had so represented to said Thornton and Ward at the time of making said sale. That said second plat was the only guide he had to go by, as he had no knowledge of said deed from Davis to plaintiff, the record of the same having been destroyed in 1860, and not having been re-recorded until 1869. Other witnesses testified that Thornton and Ward and defendant had made lasting improvements on the land.

Defendant admitted that at the time of the commencement of the suit he was in possession of the undivided one-half of lot one, block twelve, and it was agreed that he was not in possession of, and that he had never set up any claim to any portion of the land described in the petition except said lot one. There was no evidence that before executing the deed to plaintiff, Davis ever gave bond as required by the trust deed, or that the majority of the

town company ever adopted or filed any rules regulating sales by the trustee.

For the plaintiff the court instructed the jury as follows: 1. If the jury believe from the evidence that on the 14th day of October, 1859, Albert G. Davis made to plaintiff a deed for the land described in plaintiff's petition, and that said Davis was, at the time of making said deed, in possession of the land described therein as trustee of the Hamilton Town Company, and further believe that the defendant, without permission from plaintiff, entered upon the land described in plaintiff's petition, or any part thereof, and was at the time of the institution of this suit, in possession of the same, they will find for the plaintiff. 2. If the jury find for the plaintiff they will describe in their verdict the land in possession of defendant to which they believe the plaintiff is entitled.

The court refused to give the following instructions offered by defendant: 1. The jury must find for the defendant. 2. If the jury find from the evidence that the plaintiff, about the year 1860, sent to its agent at Hamilton a plat of its depot grounds in said town of Hamilton, which showed that its right of way, south of said lot, only extended fifty feet north of the center line of its railroad track, and did not include any part of said lot, and that said company caused or permitted said plat to be filed by its said agent, and that Thornton and Ward afterwards purchased said lot and made lasting and valuable improvements thereon in good faith, supposing said right of way to extend only fifty feet north of said track, as specified in said plat, and that afterwards said Thornton and Ward conveyed said lot to Green, the defendant, and one E. M. Foley, who made lasting improvements thereon, and that during all such time up to the year 1869, plaintiff set up no claim to said lot, and through its agents saw said parties so improving and occupying said lot under a claim of ownership, without objection, then the jury ought to find for the defendant.

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The jury returned a verdict in favor of the plaintiff for that portion of lot one described by the witness Smith, as included in the 100 foot strip, and there was a judgment accordingly, from which defendant appealed.

*Shanklin, Low & McDougal* for appellant.

1. Plaintiff failed to show that Davis had given bond as required by the trust deed, before executing the deed of October 14th, 1859. 2. The company reserved the right to fix the price of lots and the terms of payment by rules to be adopted by the members, and to be recorded. The deed did not authorize the trustee to give away any part of the land for depot grounds. 3. The consideration named in the deed from Davis being nominal, there is no presumption that it was paid. Whether a nominal consideration has been paid or not, is immaterial to the validity of a conveyance; the law presumes that the conveyance was voluntary. This trust deed did not give Davis authority to make a voluntary conveyance of the property conveyed to him in trust for the town company. 4. The deed from Davis to the railroad company is not "in the name of the Hamilton Town Company." It is true that it is recited in the deed that the conveyance is made by Albert G. Davis and Julia A. Davis, his wife, as trustee of the Hamilton Town Company, but for all that, the instrument seems to be the personal act of Davis and wife. As one of the town company, Davis had an equitable interest which he could convey. The wife was not trustee. If Davis was acting as trustee, why was she joined with him in the conveyance? 5. The deed purports to convey land in the southeast quarter of section 13, and not in the southwest quarter. The evidence does not show that a portion of the town, and that portion too, described in the Davis deed is not situate in the southeast quarter of the section. If there is a repugnancy between portions of the description of the premises intended to be conveyed, the burden of

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proof is upon the plaintiff to show such repugnancy, and that one portion of the description or the other, and which, should be rejected as surplusage. There is no such proof in this record. If the repugnancy exists it is latent. 6. The second instruction asked by defendant should have been given. The second plat, filed as it was at the instance of the plaintiff, misled the trustee, Higgins, and the defendant, and the plaintiff should be bound by it.

*Geo. W. Easley* for respondent.

1. Both parties claiming under the Hamilton Town Company, and through the plat thereof, as made by Davis, the trustee, neither the title of the company, nor the qualification of Davis, as trustee, can be denied. The appellant cannot claim title through the town plat made by Davis, as trustee, and at the same time deny that Davis qualified as trustee. *Merchant's Bank v. Harrison*, 39 Mo. 433; *Chouquette v. Barada*, 33 Mo. 249; *Fugate v. Pierce*, 49 Mo. 441; *Hannibal v. Draper*, 36 Mo. 332. 2. The deed from Davis to respondent refers to and must be controlled by the location of the railroad, as shown by the plat in existence at the time of the execution of the deed. The grant in the deed, made in 1859, could not be floated or changed by the making of a new plat in 1860. 3. Defendant's second instruction was properly refused; there was no estoppel. Story on Agency, § 140; *Maple v. Kussart*, 53 Pa. St. 352; 2 Wash. Real Prop., (2 Ed.) 460; Hermann on Estoppel, §§ 427, 430, 435; *Fisher v. Mossman*, 11 Ohio St. 42; *Knouf v. Thompson*, 16 Pa. St. 357; *Hill v. Epley*, 31 Pa. St. 331; *Patterson v. Esterling*, 27 Ga. 206; *Tongue v. Nutwell*, 17 Md. 212; *Odlin v. Gove*, 41 N. H. 477; *Brinkerhoff v. Lansing*, 4 John. Ch. 70; *Bigelow v. Topliff*, 25 Vt. 287; *Carter v. Champion*, 8 Conn. 554.

NORTON, J.—This is ejectment, and both parties look to the deed of E. M. Samuel as the common source of

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1. TRUSTEE: estoppel.

title. The Samuel deed was unquestionably sufficient to pass the title to Davis, who accepted the trust as the deed shows, and who entered upon his duties as trustee by making a plat of the town of Hamilton in 1855 or 1856, acknowledging and filing the same for record, as the evidence shows. As defendant claims under a deed subsequently executed by Higgins, the successor of Davis in the trust, in which the plat made by Davis was recognized, he does not stand in an attitude to dispute the authority of Davis to act as trustee. *Merchant's Bank v. Harrison*, 39 Mo. 433.

The objection made to the introduction of the deed from Davis to plaintiff on the grounds that there was no evidence that he had executed a bond to the company nor any evidence that a "majority of the town company had ever adopted or filed rules regarding the price of lots, the terms of payment," &c., and that the deed does not show that it was made by Davis as trustee, was properly overruled. The deed of Davis, if made as trustee, was effectual to pass the title to the grantee, although he may have been guilty of a breach of trust. *Gale v. Mensing*, 20 Mo. 461.

The deed of Davis not only purports to be his act as trustee of the "town of Hamilton," but purports to convey a part of the tract of ground known as the town of Hamilton, and for a full description of the property conveyed refers to the plat of the town then on file in the recorder's office. This we think was a sufficient reference to the source of his power, and also to determine whether he was executing it in his own right or as trustee. *Hagel v. Hagan*, 47 Mo. 278.

We cannot perceive how the objection to the deed that the land was described in the southeast instead of the southwest quarter of the section, could have been raised on the introduction of the deed. It contained two descriptions, one being general by numbers, the other particular by reference to the plat of the

4. REFUGNANT DESCRIPTIONS.



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town, and if, on the trial, they were found to be repugnant, the latter would control. *Fenwick v. Gill*, 38 Mo. 525; *Evans v. Greene*, 21 Mo. 170.

The objection to the deed that the consideration was nominal, is answered by the case of *Gale v. Mensing*, *supra*,  
S. TRUST DEED: and the case of *Draper v. Shoot*, 25 Mo. 197, in  
nominal consid-  
eration: railroad. which it is said that the failure to pay a nominal consideration cannot be shown to defeat a deed. The deed of Davis vested in plaintiff the title to the land which it described, and from October, 1859, when it was filed for record, defendant and all others are chargeable with notice of it. Under it plaintiff's right of recovery in this suit is confined to a tract of land north of and adjoining the tract of ground occupied by the Hannibal & St. Joseph Railroad Company as shown by the plat of the town of Hamilton at the time the deed was recorded. *Shelton v. Maupin*, 16 Mo. 124; *Nelson v. Brodhack*, 44 Mo. 596; *Dolde v. Vodicka*, 49 Mo. 98. The subsequent change of plaintiff's road 280 feet south of its original location, could not impair its right to the land as described in the deed.

We are unable to perceive the force of the objection to plaintiff's first instruction, especially in face of the admission which the record shows the defendant to have made, namely, "that at the time of the commencement of the suit he was in the possession of the undivided half of lot one in block twelve, in said town, and had never set up any claim to any portion of the land described in the petition except lot one." This is a plain concession that lot one was described in the petition. Besides this, Smith, who was a civil engineer, supplemented this admission in his evidence in the statement that he had made a survey of the premises in question, and that a strip of land 100 feet wide extending along and north of said railroad, where the same passes said lot, would include the strip of land mentioned in the verdict of the jury. This evidence, in connection with that of Davis showing the original loca-

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tion of the road, as shown by the plat on file at the time the deed was made, justified the court in giving the instruction and the jury in finding the verdict returned by them.

The second instruction asked by defendant was properly refused on the ground that there was no evidence on which to base it. The evidence does not show that Davis, who filed the second plat of said town, was in that respect acting, or authorized to act, for plaintiff. It does show that the plat was made by the engineer of plaintiff, but whether at the request of Davis, as trustee of the town company, or as the agent of plaintiff, is not shown. Nor is there any evidence that any agent of plaintiff, charged with looking after its landed interests, either had knowledge of defendant's purchase or improvements.

We deem it unnecessary to express an opinion in regard to the rights which defendant may have for any improvements under the occupying claimant law. Judgment affirmed with the concurrence of the other judges.

AFFIRMED.

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THE STATE V. O'GORMAN, *Appellant*.

1. **Clerk's Liability for failure to report fees.** The criminal liability of the clerks of the several courts of this State for failure to file a statement at the end of each year, of the fees and emoluments received during the year, attaches immediately upon the expiration of the year, and not at the end of thirty days thereafter. It is the liability to a civil action which does not accrue till the thirty days have elapsed. Wag. Stat., §§ 29, 31, p. 631.
2. **Pleading, Criminal: NEGATIVING EXCEPTIONS IN STATUTES.** Where a statute required the clerks of courts, at the end of each year, to file a statement of the fees and emoluments received during the year, and made it a misdemeanor to fail to comply with this requirement, but excepted certain cases from the operation of the act,

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*Held*, that an indictment under the act need not show that the case was not one of those excepted.

3. **Fraud in Office.** The third count of the indictment in this case, examined and held good as an indictment for fraud in office under Wag. Stat., sec. 17, p. 487.
4. ———: **EVIDENCE.** Upon the trial of an indictment against a county clerk for failing to make the annual statement required by law, showing the amount of fees and emoluments received from his office during the year 1874, evidence offered by the State showed that he had made such statements in previous years. *Held*, that such evidence did not prejudice the defendant, and the admission of it was no ground for reversing a judgment against him.
5. **Instructions.** A party cannot complain if the court so modifies one of his instructions as to make it necessary for the other party, in order to sustain his case, to prove more than the instruction, as offered, required.

*Appeal from Lafayette Criminal Court.*—HON. WM. H. H. HILL, Judge.

The appellant, who was the former clerk of the county court of Lafayette county, was indicted at the June term, 1875, of the criminal court, for fraud in office. The indictment contained three counts, the second of which was abandoned at the trial. The first count charged that defendant "being the clerk of said court from January 1st, 1871, to January 1st, 1875, did, on the 1st day of January, 1875, and at the end of the year 1874, willfully, corruptly, knowingly, &c., fail and refuse to file a statement in detail, under oath or affirmation, showing the aggregate amount of fees and emoluments received by him as clerk for the year 1874."

The third count charged that "defendant, during his term of office, and on the 18th day of November, 1874, did, willfully, corruptly, fraudulently, &c., represent and show that he had not received, for the year 1874, in the aggregate of all official fees and emoluments, more than the sum of \$2,500, after deducting such sums as were necessary and proper for the payment of deputies and assistants; and that there was no surplus to pay into the county treasury;

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and did then and there procure the court to receive the said statement, and discharge the said defendant from making any further statement or settlement of official fees for the year 1874, and did so cause the court to make said order, whereas, in truth, the fees for said year amounted to \$7,764, and leaving a balance, after deducting \$2,500 and reasonable deputy hire, of \$2,598; that he did, with the intent to cheat, cause and procure said false settlement and discharge to be made, and is, therefore, guilty of a fraud in office."

Defendant filed a motion to quash the indictment, the grounds of which are stated in the opinion of the court. This motion was overruled, and defendant excepted.

At the trial the State offered the records of the county court as follows: 1. November 18th, 1874. Now comes James O'Gorman and states that the fees received by him in 1874 do not exceed the amount allowed by law, and the court being satisfied from this statement that such fees do not exceed that amount, settles with him—to which the defendant objected, as the same was illegal and incompetent, as the same was made at a time when the defendant could neither make or the court act upon such a statement, and the statement did not appear to be under "oath or affirmation." The objection was overruled and defendant excepted. 2. January 1st, 1875, O'Gorman ordered to appear and settle at adjourned January term. 3. January 18th, 1875, O'Gorman appears and offers settlement. 4. Steele ordered to examine records, and write to State auditor and report at next term of court amount of fees received by O'Gorman. 5. So much of record as showed Steele did make a report. 6. Order reciting—whereas O'Gorman, through his deputy, represented to county court on the 18th day of November, 1874, that his fees did not exceed amount allowed by law, and proper deputy hire; whereas, at January term, 1875, he stated they amounted to \$5,-979.16; and whereas, subsequent investigation by Steele showed \$7,764.99 was received, and O'Gorman swore this

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was correct; and whereas, he was then ordered to pay \$2,598.35 into the treasury, and has not done so, the prosecuting attorney is ordered to bring suit, and these proceedings to be certified to the grand jury, to meet in a few days.

Wm. B. Steele, for the State, testified that he was the present county clerk. The county court was in session December 21st, 1874, and adjourned to January 4th, 1875. With reference to order of November 18th, 1874, he never saw any statement in detail or under oath; all he saw was the record; a short time after defendant was cited to appear before the county court and make a settlement, he came into the office and wanted witness to assist him in examining the records, and get an account of all the fees he had ever received; I did assist him; he called off the amounts and I set them down; found several amounts not on the index; we tried to get all items; I made out the list; O'Gorman brought it into court, but would not swear that it contained all the fees, as he might have overlooked some; we found a few items not indexed; the order of the 18th day of November, 1874, is in the handwriting of Dulin, O'Gorman's deputy; there is no statement in detail for 1873; there is an order on record showing that defendant settled with the court, and that the court was satisfied by the evidence; likewise for 1871 and 1872 the court was satisfied by the evidence and settled; witness did not know what evidence was before the court; witness examined the records for 1871, 1872 and 1873, and found no settlement in detail or under oath for these years; it does appear from the record that defendant appeared and settled each year, but not in detail. Defendant objected to all evidence as to these years, because it is not charged that he failed to settle for these years, and the only tendency of the evidence is to show defendant guilty of another and distinct offense.

J. A. Quarles, deputy under Steele, testified about the same as Steele; and in addition, that the settlement of de-

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fendant being continued to the February term, 1875, defendant appeared and swore to a statement on which the court settled; witness stated that it was a correct statement; defendant claimed that the order of November 18th, 1874, was made without his knowledge, and he never claimed the benefit of it or relied on it before the county court; all fees received by defendant can be found from his books; the books are correct; he told me I was more familiar with the books than he was, and for me to go over them and see that all the fees were included in his statement.

The State then read the orders of settlement for the years 1871, 1872 and 1873, and also read in evidence a detailed statement of the fees for those years prepared by the witness Quarles. This statement was prepared from the official records and papers of the county, and showed that defendant had received during the year 1871, \$7,604.39; during the year 1872, \$9,825.36, and during the year 1873, \$7,783.77. Defendant objected for the reason stated above, and also because the books were the best evidence.

For the defendant Judge Steunkel, one of the justices of the county court, testified that on the 18th day of November, 1874, as court was about to adjourn, Dulin, the deputy, said, "What about O'Gorman's settlement?" The presiding judge asked if the county attorney had approved it, and Dulin said "Yes," and presented a paper with the county attorney's name to it, and the presiding judge then said, "Let the order be made;" defendant was not present; he made no affidavit or statement to the court on November 18th, 1874, or before; he neither said nor did anything.

The state asked four instructions, which were given: 1. If defendant was county clerk for the year 1874, and his fees and emoluments for that year were in excess of \$2,500 and reasonable deputy hire, as allowed by the county court; and if, on the 1st day of January, 1875, or at the end of the year 1874, he failed and refused to file a detailed report, and deliver the same to the justices, with



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the intent, &c., of defrauding the county of the surplus over \$2,500, or such sum as allowed by the court, then the jury should find defendant guilty on the first count. 2. If, as clerk, &c., he procured, or caused to be procured, from said court, the order (November 18th, 1874,) discharging him from all liability for such surplus, with the intent, &c., the jury will find defendant guilty on the third count. 3. If there was a large amount in excess of \$2,500 and deputy hire, as fixed by the court, and he failed and refused to file under oath or affirmation a detailed statement at the end of the year of fees for 1874, with the intent to appropriate such surplus, and not account for the same, such intent was unlawful and corrupt; and if he procured, or caused to be procured, the order discharging him from liability (order of November 18th, 1874), with the intent, &c., the jury will find him guilty. 4. If clerk, it was his duty, at the end of the year 1874, or prior to the 3d day of January, 1875, to make out and deliver to the county court a statement in detail, under oath, showing his fees; and if he willfully and corruptly failed and refused to make the statement, the jury will find him guilty.

The following instructions asked by defendant were given: 1. By the first count of the indictment the defendant is charged with a misdemeanor in not having filed, at the end of the year, a detailed statement in writing, under oath, showing the aggregage amount of all official fees received by him as county clerk for the year ending January 1st, 1875, and although the jury may believe and find from the evidence that the defendant failed to file said statement at the end of the year, yet, if the jury further find that he did afterwards file said statement, under oath, and that the same was received and approved by the county court, then the jury will find the defendant not guilty as to said count, unless they should further find and believe from the evidence that he failed to file said statement at the end of the year with intent to cheat and defraud the county, or from some other willful or corrupt motive. 2. In order to con-

stitute a misdemeanor, as charged in the first count of the indictment, it is necessary that the intent and the act upon the part of the defendant must correspond, and although the jury may find from the evidence that the defendant failed to file said itemized statement at the precise time required by the statute, yet, in order to constitute a misdemeanor the jury must find that defendant willfully and corruptly failed to file said statement with intent thereby willfully and knowingly to commit a fraud upon the county.

3. Although, by the language of the statute, defendant is required to file said itemized statement, under oath, at the end of the year, and if he fails to do so, he may be guilty of a technical violation of the law, yet, in order to constitute a misdemeanor, it is necessary that said failure should have occurred upon the part of defendant, with intent, upon his part, knowingly and willfully, to commit a fraud upon the county, or from some other willful or corrupt motive. 5. The guilt of defendant cannot be inferred, but must be proven either by direct or circumstantial evidence, but before the jury can find defendant guilty on circumstantial evidence alone, the facts and circumstances must all point to his guilt and be irreconcilable with any other rational conclusion; and before the jury can find defendant guilty on circumstantial evidence alone, the circumstances must not only be consistent with his guilt, but inconsistent with any other reasonable hypothesis.

The court gave the following instruction asked by defendant, adding, however, the words included in parenthesis: 4. The jury are instructed that in third count of the indictment the defendant is charged with fraud in office as the clerk of the county court, in this, that he did falsely and fraudulently procure and induce the county court, on the 18th day of November, 1874, to settle with him for the fees received by him, as such clerk, for the year 1874, and did falsely and fraudulently represent and state to the court that the amount of fees received by him for said year did not exceed the sum of \$2,500, and a reasonable sum for

deputy hire, whereas he had received an amount largely in excess of said sum, and that, by such representation, he did falsely and fraudulently procure the county court to make an order discharging him, the said O'Gorman, with the intent to cheat and defraud the county of Lafayette. Unless the jury believe from the evidence that the defendant did represent, or cause to be represented, (falsely and fraudulently, with the intent to cheat and defraud the county,) that he had not received more fees than was allowed by law, and unless he, the defendant, did induce and procure, or cause to be induced and procured, the county court, by his representations and statements to it, to enter and make the order read in evidence, dated November 18th, 1874, you will find defendant not guilty on the third count.

The defendant asked the following instructions, (in substance,) which were refused :

6. If the jury believe that the court was not in session on December 31st, 1874, or January 1st, 1875, that it did not meet till the 4th of January; that on meeting, the court made an order notifying defendant to appear and file a detailed statement of fees for the year 1874; that he did appear and file such statement, which was approved and accepted by the court, they would find defendant not guilty.

7. That if the jury believe that a statement in detail was not filed until March 1st, 1875, for the reason that from January 4th up to said date, the court had adjourned the hearing of said settlement from time to time, that its then present clerk might examine the records to ascertain said fees; that on March 1st said examination was completed, and defendant made his statement in detail and under oath, which was accepted and approved, and that the then clerk also made his report, that defendant did not fail to file said report corruptly and willfully for the purpose of defrauding the county, but in order that he and others might fully examine the records and books, and get a full, complete and true list of fees, they would find defendant not guilty.

8. If they believe from the evidence that the term of

defendant's office expired on the 31st day of December, 1874; that neither on that day or the 1st day of January, 1875, was the court in session, they would find the defendant not guilty on the first count.

9. That the defendant was required to file a statement in detail of all fees received, or he could dispense with such statement if the court should be satisfied by other evidence as to the amount of such fees, and that the clerk had not only until the end of the year, but also thirty days after the close of each year in which to file such statement; that if the jury believe that the court was not in session at the end of the year 1874; that afterwards, and within thirty days, the court met and cited defendant to appear and make a settlement; that in obedience to said citation he did appear to make a settlement, whereupon the court continued his settlement till the February term; that at this term the then present clerk was ordered to examine the books and papers, and correspond with the State auditor, and the settlement was continued until March; that at said March term defendant made his statement, which was accepted, they will find defendant not guilty.

10. If the jury believe the order of November 18th, 1874, was made on the representation or statement of Dublin; that O'Gorman was not present, did not appear, did not make any statement or showing to the court, did not file any affidavit or statement showing the amount of fees, and did not, by any such statement procure or induce the court to make said order they will find defendant not guilty on the third count.

12. The orders of the court settling with defendant for 1871, 1872 and 1873, as also the tabular statement of fees for those years made out by witness Quarles, and all evidence relating to those years was admitted solely as bearing on the intent of the acts and conduct of defendant in 1874, and there was no evidence to show that the settlements for 1871, 1872 and 1873 were obtained by false or fraudulent representations, nor what was a reasonable sum

The State v. O'Gorman.

for deputy hire for those years; that said orders having been made by a court of competent jurisdiction on what purports to have been competent and satisfactory evidence to said court, all evidence as to said years is excluded and withdrawn from the jury.

Defendant was convicted, and appealed to this court.

*Rathbun & Shewalter* for appellant.

*J. L. Smith*, Attorney-General, for the State.

HENRY, J.—The motion to quash the indictment was properly overruled. The first count charged defendant with a failure, at the end of the year 1874, 1. CLERK'S LIABILITY FOR FAILURE TO REPORT FEES. to file a statement in detail, under oath or affirmation, showing the aggregate amount of fees and emoluments received by him as clerk for the year 1874. His counsel contend that, in order to be sufficient, it should have been alleged that he failed, neglected and refused, for thirty days after the expiration of said year, to file such statement. Wag. Stat., sec. 29, p. 631, requires "the clerks of the several courts, &c., except as hereinafter provided, at the end of each year during their respective terms of office, to deliver to the judge, or judges, of their said courts, under oath or affirmation, a statement in detail, showing the aggregate amount of all fees and emoluments received by them as clerks during the year last past." Section 31 provides that "any clerk who shall fail, neglect or refuse, for thirty days after the expiration of each year of his office, to file such statement, except as set forth in the \*fifth section of this act, shall be liable on his official bond for the surplus which the court may, upon investigation and ex-

\*The section here referred to is the fifth in the act as originally enacted. Acts 1868, page 54. In Wagner's Statutes it is numbered 33, and is as follows: This act shall not apply to any clerk who, at the time required by the first (29th) and fourth (32d) sections thereof, shall, by his affidavit or other testimony, fully satisfy the court of which he is clerk that all the fees and emoluments of his said office for and during the year last past, do not exceed the sum of \$2,500. See page 632.

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amination of evidence find to be due from him, after deducting from the aggregate amount of his fees and emoluments for the year last past, the sum of \$2,500, and a reasonable amount for the payment of deputies and assistants, where the same were employed; and if any clerk should fail, neglect or refuse to pay into the county treasury the amount ordered by the court to be paid by him within the time required by the second section of this act, (ten days,) he shall be liable on his official bond for the sum so ordered to be paid by him into the county treasury; and in all cases in which any clerk shall not file a statement within the time prescribed by this act, &c., he shall be deemed guilty of a misdemeanor in office," &c. The argument of the defendant's counsel is, that the time prescribed by the 29th section for filing the statement is enlarged by the 31st section, but we think it very clear that the provision in section 31, in regard to a failure to make the statement within thirty days after the expiration of the year, has no reference or application to the criminal aspect of the statute, but only to the civil proceeding therein expressly authorized. The 29th section absolutely requires the statement to be made at the end of the year, and the latter clause of the 31st section makes a failure to do so a misdemeanor in office.

It is further urged that the indictment should have negatived the exceptions in section 33, because it is referred to in section 31, which makes the failure of the clerk to file the statement a misdemeanor. The opinion of the court in the case of *Com. v. Hart*, 11 Cush. 130, sustains this view, but the question was not directly involved in that case, and in support of the position the court only referred to two English cases. To the contrary is *Chitty*, 1st Crim. Law, 283, 284. Bishop in his work on criminal procedure says, the doctrine laid down by *Chitty* is that which is generally followed in the United States. The *State v. Abbey*, 29 Vt. 65, is directly in point. A statute of that State provided that: "If any person who has a former husband or wife living, shall marry an-

2. PLEADING.  
CRIMINAL. nega-  
tiving exceptions  
in statutes.



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other person, or shall continue to cohabit with such second wife in this State, he, or she, shall, except in the cases mentioned in the following section, be deemed guilty of the crime of polygamy, and shall be punished," &c. Section 6 provided that "the act shall not extend to any person whose husband, or wife, has been continuously beyond the sea or out of the State for seven years," &c. The court held it unnecessary to negative the exceptions in the 6th section.

A *nolle prosequi* was entered to the second count.

The first objection to the third count is, that it did not allege that defendant failed, neglected and refused to file 3. FRAUD IN OFFICE. such statement within thirty days after the expiration of the year. This was unnecessary. The third count is an indictment for a violation of Wag. Stat., sec. 17, p. 487, which makes it a misdemeanor for any officer, or public agent of this State, to commit a fraud in his official capacity or under color of his office. The allegations are, that defendant willfully, corruptly and fraudulently made a false statement and procured the court to receive said statement and make an order discharging him from making any further statement, and that this false and fraudulent statement was made corruptly and falsely, with the intent to cheat and defraud the county and the inhabitants out of the surplus, &c. It contained all the allegations necessary to charge an offense under said section 17.

The second objection to this count is, that it does not allege that "the defendant did not, during the time required by law, by his affidavit, or other testimony, satisfy the court that the fees and emoluments of his said office did not exceed the amount allowed him by law." The answer to this is that defendant, by this count, is not indicted for a violation of the act in relation to fees, Wag. Stat., p. 631, but for a violation of section 17, *supra*. If, however, he had been indicted under the former statute, we have seen that it would have been unnecessary to negative the exception contained in section 33.

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On the trial the court permitted the State to show that defendant had, for the previous years, and within the time  
4 —: EVIDENCE prescribed by the law, delivered to the judges of the court of which he was clerk, his annual statement. We cannot see how defendant was prejudiced by evidence tending to show that, for the preceding years he had complied with the law. If the State had been permitted to show, that in any previous year he had failed to comply with the requirement of the law, a different question would have been presented.

The modification by the court of the fourth instruction asked for by defendant, of which defendant complains,  
5. INSTRUCTIONS. certainly made the instruction more favorable for defendant than it was before the change was made. As presented by defendant, it declared that unless the jury believe from the evidence that defendant did represent, or cause to be represented, that he had not received more fees, &c. The court inserted after the word "represented" the words "falsely and fraudulently with the intent to cheat and defraud the county," thus requiring not only that they should find that the defendant made the representation, which was the form of the instruction as asked by defendant, but that they should also find that it was falsely and fraudulently made, &c., before he could be convicted. Why defendant complains of that alteration of the instruction we cannot comprehend.

The objection to the second instruction is, that under the third count there was no proof that defendant made any statement to the court, or introduced any evidence as to amount of fees received by him. The records of the county court, introduced in evidence, and the testimony of Steele tended to prove that O'Gorman did make a statement to the court of fees, &c. received by him, and procure the order discharging him.

The instructions given by the court fully and fairly presented the law of the case to the jury, and the substance of those refused which were not objectionable, was

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The State v. Smallwood.

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embraced in those given. The record is voluminous, and the instructions numerous and prolix, and it is unnecessary to comment upon them severally and in detail. We are satisfied that no material error was committed by the court, and its judgment is affirmed. All concur.

AFFIRMED.

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THE STATE V. SMALLWOOD, *Appellant*.

1. **Obtaining Property under False Pretenses:** PLEADING, CRIMINAL. An indictment under Wag. Stat., sec. 47, p. 461, for obtaining the property of one H. M. under false pretenses, after setting out the false pretenses resorted to and charging that they were unlawfully, willfully, knowingly, feloniously and designedly made by defendant, averred that H. M., relying on them as being true, delivered his property to defendant, and further charged that by means of these false pretenses, defendant unlawfully, &c., obtained said property from said H. M. with intent to cheat and defraud said H. M. *Held*, that the indictment was not insufficient as failing to allege that the false pretenses were made with intent to cheat and defraud and were relied on by H. M.
2. **Practice, Criminal:** GRAND JURY. A motion in arrest of judgment on the ground that the record does not show that the grand jury, which returned the indictment against defendant, was empaneled and sworn, is properly overruled. The objection comes too late after verdict.

*Appeal from Scotland Circuit Court.*—HON. JOHN C. ANDERSON, Judge.

*J. L. Smith*, Attorney-General, for the State.

NORTON, J.—The defendant, Jesse Smallwood, and one Jacob Smallwood, were indicted in the Adair circuit court, at its February term, 1877, for obtaining property under false pretenses. At the instance of defendant the venue of the cause was changed to the Scotland circuit court, where, at the May term, 1877, thereof, he was put upon his trial,

which resulted in his conviction, and the assessment of his punishment to two years imprisonment in the penitentiary. From this judgment he appeals, and seeks a reversal of the judgment because of an alleged insufficiency of the indictment.

The indictment charges that the defendant and Jacob Smallwood, on, &c., at, &c., unlawfully, willfully, knowingly, feloniously and designedly, did falsely pretend to one Hezekiah Moore that they, &c., had then and there purchased for themselves, and said Hezekiah Moore jointly, in equal interests, of one Marquis McDonald, a certain ten acres of land and coal bank thereon, for the sum of \$1,200; that they, &c., had then and there paid to said Marquis McDonald for said ten acres of land and coal bank thereon, said sum of \$1,200; that they, &c., had then and there paid to said Marquis McDonald, for their said interests in said ten acres of land and coal bank, \$800 of said \$1,200; and that they, &c., had then and there paid to said Marquis McDonald for his, said Hezekiah Moore's, interest in said ten acres of land and coal bank, \$400 of said \$1,200, and that said \$1,200 was the least sum of money the said Marquis McDonald would then and there take for said ten acres of land and coal bank; and the said Jesse Smallwood and Jacob Smallwood then and there demanded of him, the said Hezekiah Moore, that he, the said, &c., as compensation and reimbursement to them, the said, &c., for said falsely pretended payment of said \$400 to said Marquis McDonald for said Moore's interest in said ten acres of land and coal bank aforesaid, turn over and deliver to them, the said, &c., twenty-four head of cattle, then and there the property of said Moore; that said false pretenses, aforesaid, were then and there made by said Jacob Smallwood and Jesse Smallwood for the purpose of obtaining from said Hezekiah Moore twenty-four head of cattle; and by means of said false pretenses, the said Hezekiah Moore, then and there relying on the false pretenses aforesaid, as being true, did then and there deliver over to said Jesse

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Smallwood and Jacob Smallwood the twenty-four head of cattle aforesaid; and by means of which said false pretenses, the said Jacob Smallwood and Jesse Smallwood did then and there unlawfully, willfully, knowingly, feloniously and designedly obtain from the said Hezekiah Moore said twenty-four head of cattle, which were then and there of the value of \$400, and were then and there the property of said Hezekiah Moore, as aforesaid, with intent then and there to cheat and defraud him, the said Hezekiah Moore; whereas, in truth and in fact, &c. The indictment negatives the truth of the representations alleged to have been made.

Various objections are presented to the indictment in the motion in arrest, the most important of which are that

1. OBTAINING  
PROPERTY UNDER  
FALSE PRETENSES:  
pleading, criminal.

it fails to allege that the representations were made "feloniously, knowingly and designedly with intent to cheat and defraud," or that

Moore parted with the cattle relying on the representation. The indictment charges that defendant "willfully, feloniously, knowingly and designedly," made certain false pretenses by means of which he obtained from Moore the property mentioned therein, "with intent then and there to cheat and defraud him." It is based on Wag. Stat., sec. 47, p. 461, and charges the offense in the language of the act, and is in strict conformity to precedents. 2 Bish. Crim. Law, § 162; 3 Chitty Crim. Law, §§ 1009, 1020. The sufficiency of an indictment founded on the same statute, and which preferred the charge in the same language to be found in the one under consideration, was drawn in question in the case of the *State v. Scott*, 48 Mo. 422, and it was held to be sufficient. The indictment also charges, in appropriate language, that Moore, in reliance upon the truth of the representations parted with his property.

The objection made in the motion in arrest that the record did not show that a grand jury was empaneled and sworn, cannot be considered. It does show that the indictment was returned into the

2. PRACTICE, CRIMINAL: grand jury.

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The St. Louis Type Foundry v. McCann.

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Adair circuit court by a grand jury consisting of twelve men. The objection that it does not show that they were empaneled, charged and sworn, comes too late after verdict. *State v. Burgess*, 24 Mo. 381; *Brantley v. State*, 13 S. & M. 468; *People v. Robinson*, 2 Park. Crim. Rep. 235, 311; *People v. Griffin*, 2 Barb. S. C. Rep. 427. Judgment affirmed, with the concurrence of the other judges.

AFFIRMED.

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THE ST. LOUIS TYPE FOUNDRY V. MCCANN, *Appellant*.

**Verdict against the Weight of Evidence:** SUPREME COURT. When the questions involved in a case have been submitted to the jury under proper instructions, the Supreme Court will not, in an action at law, reverse the judgment on the ground that the verdict is against the weight of evidence.

*Appeal from Greene Circuit Court.*—HON. W. F. GEIGER,  
Judge.

This was a suit upon two promissory notes executed by W. J. Teed, in the name of W. J. Teed & Co. Plaintiff sought to charge defendant, McCann, as a member of that firm. Teed swore that he was a member. McCann swore that he was not. It was not claimed that he took any part in the management of the business, but there was evidence that he was to share in the losses and profits of the business, and that Hayward, his brother-in-law, who was active in it, was, in reality, his representative.

For the plaintiff the court instructed the jury as follows: Although you may believe from the evidence in the case that the name of McCann did not appear publicly as a member of the firm of W. J. Teed & Co., but that he, McCann, in fact owned one-half interest in the printing office, and was to share in the losses and profits of the busi-



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ness, and that W. W. Hayward was simply in the office representing McCann's interest, under a private agreement between said McCann and Hayward, then, and in that case, said McCann was in law a partner, and plaintiff should recover against him in this action.

For the defendant the court instructed as follows:

1. That a partnership is a contract between two or more persons to enter upon some business undertaking; that the agreement and intention of the parties themselves must govern when it is sought by third persons to charge them as partners, and under this instruction the jury will first find whether a partnership contract was made and entered into between Teed and McCann. 2. That if no such contract of partnership was entered into and mutually agreed to between Teed and McCann, the jury will find for the defendant, McCann. 3. That to be a member of the partnership, defendant, McCann, must either have some interest in the capital or the profits of the partnership, or must have held himself out to the plaintiff as a partner. There was a verdict and judgment for plaintiff and defendant appealed.

*T. S. Heffernan* for appellant.

*John O'Day* for respondent.

HOUGH, J.—The only question in this case was, whether, at the time the notes sued on were executed, the defendant, Geo. H. McCann, was a member of the firm of W. J. Teed & Co. This question was submitted to the jury under instructions of which the defendant has no reason to complain. The first instruction given, at the instance of the defendant, did not correctly declare the law, but he could not be injured by it, and if injured, he could not complain. *Crutchfield v. St. L., K. C. & N. Ry.*, 64 Mo. 255. Persons may be held liable as partners, by third persons, when they are not in reality partners, *inter sese*. The testimony is

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The State v. Jones.

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conflicting, and the appellant claims that the verdict is against the weight of evidence, but we are not at liberty in actions at law to disturb a verdict for that reason. The judgment is affirmed. All concur.

AFFIRMED.

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THE STATE, *Appellant*, v. JONES.

**Pleading, Criminal:** FRAUDULENT CONVEYANCE. An indictment under Wag. Stat., sec. 52, p. 462, for making a deed to land without reciting an existing mortgage covering the same property, is bad, unless it gives a particular description of the land. It is not sufficient to designate it as "certain house and lot in Humansville, Polk county, Missouri."

*Appeal from Polk Circuit Court.*—HON. R. W. FYAN, Judge.

*J. L. Smith*, Attorney-General, for the State.

NAPTON, J.—This indictment was drawn under the 52d section of the 3d article of the statute concerning crimes and punishments. That section makes it a misdemeanor for one to make a deed for any land, or for any goods or chattels which he had previously conveyed to another, and the first deed still outstanding and in force, without reciting the first deed, provided this is done with intent to defraud. This indictment charged that Jones, at, &c., on, &c., unlawfully, willfully and fraudulently made a deed to two men, naming them, for a certain house and lot in Humansville, Polk county, Missouri, without then and there in said conveyance aforesaid, reciting a prior mortgage made by said Jones on the 8th day of May, 1875, embracing the same land, then in full force, &c. The objection to the indictment, in the circuit court was, that the number of the lot is not given, nor any other description of it, by which it might be identified, and the circuit court sustained

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Davenport v. Murray.

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the objection. We think the circuit court was right. Some little certainty should surely be observed in criminal proceedings so that defendant should be fully apprised of the offense charged. He may have been a large dealer in lots in Humansville, and made several deeds on that day, and he may have made several mortgages prior to the deeds. It was quite easy for the pleader to have designated the lot. It will be observed, also, that conveyances of goods and chattels, as well as lands, are embraced in this section. Would it be enough to describe the deed merely as conveying "goods and cattels," without specifying what they were? Judgment affirmed. The other judges concur.

AFFIRMED.

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DAVENPORT V. MURRAY *et al.*, Appellants.

1. **Pleading: VENDOR'S LIEN.** Whether a petition is multifarious or not, is to be determined, not from the prayer, but from the allegations contained in it. Hence, when the petition stated that plaintiff sold certain land to defendants, who were husband and wife, and at their request made the deed to her, vesting in her a separate estate, and that both defendants gave their note for the purchase money, and then prayed for a general judgment against the husband on the note, a special judgment against the separate estate of the wife, and for a sale of the land to satisfy a lien which the plaintiff claimed as vendor; *Held*, that the petition set out only one cause of action, its object being to obtain a judgment against the husband for the unpaid purchase money and to subject the land to sale for its payment.
2. **Vendor's Lien: EVIDENCE.** The petition in a suit to enforce a vendor's lien misdescribed the estate vested in the vendee by the vendor's deed, *Held*, that this did not make the deed inadmissible in evidence, because the real question was whether the land was subject to the lien, and that did not depend on the character of the vendee's estate.
3. —: **HUSBAND AND WIFE: PAROL EVIDENCE.** Taking the husband's name on the wife's note for the purchase money of land conveyed to the wife, does not waive the vendor's lien for the pur-

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chase money where the purchase was made by the husband and the land was conveyed to the wife at his request; and parol evidence is admissible to show that the purchase and conveyance were so made.

*Appeal from Lafayette Circuit Court.*—HON. WM. T. WOOD,  
Judge.

*Alex. Graves* for appellants.

*Rathbun & Shewalter* for respondent.

NORTON, J.—This suit was instituted in the circuit court of Lafayette county to enforce a vendor's lien. On a trial of the cause plaintiff obtained judgment, from which defendants, after motions in arrest and for new trial had been overruled, have appealed to this court. The errors assigned are that the court erred in overruling defendants' motion to require plaintiff to elect on which cause of action she would proceed; in overruling demurrer to the petition; in sustaining plaintiff's motion to strike out part of answer, and in admitting illegal evidence.

The petition alleges that plaintiff was the owner of certain land therein described, that she sold the same to defendants, (they being husband and wife,) and, at their request, made the deed to the wife, vesting in her a separate estate; that, for the unpaid purchase money the note described in the petition was given and signed by both defendants. Plaintiff asks judgment against defendant T. B. Murray, a special judgment against the separate property of defendant Lucretia Murray, and for sale of the land in question to discharge the vendor's lien. It is claimed by defendants that the petition contains two causes of action in the same count, and that, for that reason, the motion to require plaintiff to elect on which cause she would proceed ought to have been sustained. (As we construe the petition, it substantially sets forth but one cause of action, that being simply to subject the land conveyed to the payment of the unpaid purchase price. It is true that a judgment is prayed for against Thomas B. Murray, as well as a special

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judgment against the separate property of Lucretia, and that the real estate be sold to satisfy the lien of the vendor, but the character of the petition is not to be determined from its prayer, but from the allegations it contains. Applying this test it would seem that all the pleader intended to accomplish was to obtain judgment against defendant T. B. Murray, for the unpaid purchase money and subject the land to sale for its payment. *Henderson v. Dickey*, 50 Mo. 161; *Ames v. Gilmore*, 59 Mo. 537. What is here said in regard to this motion applies also to the demurrer to the petition on the ground of multifariousness in stating two causes of action in the same count. We perceive no error in the action of the court in overruling both the motion and demurrer.

Plaintiff offered in evidence the deed from her to Mrs. Murray. This was objected to on the ground of variance in this, that the petition alleged that the deed vested in Mrs. Murray a separate estate, when in fact it conveyed to her an absolute estate subject to the marital rights of her husband. This objection, we think, was properly overruled, as the real question involved was whether the land held by her under the deed (without regard to the estate conveyed, whether separate or absolute), was subject, under the facts in the case, to a vendor's lien. The answer admits that the note was given in consideration of the land. When defendant accepted the conveyance she knew that the portion of the purchase money represented by the note was unpaid, for she admits in her answer that the note was given in consideration of the land, but denies that there was a vendor's lien retained. Although the pleader may have mistaken the legal effect of the deed in alleging that it conveyed a separate estate, when in fact it conveyed an absolute estate, still the right of the vendor to subject the land to the payment of the purchase money remained, unless it had been waived or abandoned.

And what will, or will not, constitute a waiver is thus

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clearly expressed in *Emison v. Whittlesey*, 55 Mo. 254. "The implied lien of a vendor will be sustained whenever the vendor has taken the personal security of the vendee only, by bond, note or covenant, which will be considered as intended to countervail the receipt of the purchase money contained in the deed or to show the time and manner in which the payment is to be made, unless there is an express agreement to waive the lien; and on the other hand the lien will be considered as waived whenever any distinct and independent security is taken, whether by mortgage on other land, pledge of goods or personal responsibility of a third person, and also when a security is taken on the land either for the whole or a part of the unpaid purchase money, unless there is an express agreement that the lien shall be retained." It is insisted that the evidence of Mrs. Davenport, the plaintiff, showing that the contract of purchase was made with Thomas B. Murray, the husband of Lucretia, and that the deed was made to her at his request, was inadmissible, because it was contradictory to and explanatory of the deed. The evidence offered was not open to this objection. Its purpose was not to add to, alter or vary the deed, or to determine the character of the estate conveyed thereby, but simply to show that the price agreed to be paid for the land conveyed had not been paid, and that Lucretia, the grantee in the deed, accepted it with knowledge of this fact. We think it was entirely competent to show this, and without resort to such evidence, it would be difficult, if not impossible, for a vendor of land, who had executed a deed to the vendee and taken his note for the purchase money, to enforce such lien. If the deed in question had named the husband as grantee, and he had made a voluntary conveyance to the wife, the land thus conveyed would have been chargeable in her hands with the lien, and the mere acceptance by the wife in the first instance of a conveyance from the vendor at the request of the husband, who contracted



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for the land, could not change the rights of such vendor. Judgment affirmed, in which the other judges concur.

AFFIRMED.

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THE STATE V. SANDERS, *Appellant*.

**Practice, Criminal:** EXPERIMENTS BY THE JURY OUT OF COURT. The counsel for the defendant in a criminal case, in the course of his argument to the jury after the close of the evidence, told them that they had a right to try for themselves whether worn-out boots, like those described by the witnesses for the State, would make such tracks in the dust or sand as they described, and advised the jury to make the experiment. Several members of the jury accordingly did make the experiment, out of court, without obtaining the leave of the court, and in the absence of the defendant. *Held*, that this was such misconduct as invalidated the verdict, and the defendant was not precluded from alleging it as ground for a new trial by the fact that it was done at the instance of his counsel. It was the duty of the court and the State's attorney to have warned the jury against making the experiment.

*Appeal from Greene Circuit Court.*—HON. W. F. GEIGER, Judge.

*Bray & Cravens, Walser & Cunningham* for appellant.

*J. L. Smith*, Attorney-General, for the State.

NAPTON, J.—This was an indictment for an assault upon one George Burgoon, with intent to kill. The assault was committed on the night of the 26th of July, 1876, when Burgoon, who lived about three miles from Carthage, in Jasper county, was in his bed asleep between ten and eleven o'clock at night. That the assault was cowardly and with murderous intent, is not questioned, the only question being whether the defendant was the man who committed it. As the night was dark, the evidence was necessarily mainly circumstantial, and strongly pointed to

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the defendant; there was also a mass of testimony equally strong conflicting therewith not indicating or implicating any other person, altogether making a case peculiarly proper for a jury. The only matters for our consideration are the propriety of the instructions and the admissibility of the evidence on which they were based, and the refusal of the court to set aside the verdict on account of alleged misbehavior of the jury.

The evidence in regard to the criminal intercourse between Mrs. Burgoon and the defendant—the quarrels between the husband and wife, and the law-suit between Burgoon and defendant, all growing out of this alleged intimacy, in our opinion, was proper for the consideration of the jury, and submitted to them under proper instructions. The only instruction to which serious objection is made is the 6th, and the only objection to this is, that there was no evidence to authorize it. After a careful examination of the testimony, extensive as it is, we have reached a different conclusion. We think there is some evidence to support the theory that defendant had something to do with the writing, or procuring of the writing, of the letters referred to in that instruction, although the preponderance of the testimony is undoubtedly to the contrary. But this was a matter for the jury. Burgoon testifies that the superscription on the envelope of the letter purporting to come from his wife was in Sanders' handwriting, and that he never wrote any letter to her after their separation and her removal to Carthage. The experts introduced by the defendant testified that all the letters produced were in the same handwriting, and some of them declared that the handwriting in all was that of Burgoon. It was for the jury to decide how this was, and, therefore, the 6th instruction to them, that "if they believed the letters, purporting to have been written by Burgoon, were written, or procured to be written, by the defendant, to be used as evidence in his favor, this may be considered by them in

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determining the guilt of the defendant," was proper and authorized by the evidence.

The principal objection to the judgment in this case is based on an affidavit in regard to the misconduct of the jury. This affidavit was made by one Snyder, who was not a juror. He states that on the morning after the jury retired he saw several persons, whom he afterwards ascertained to be jurors, experimenting with an old shoe, which had a hole freshly cut through the sole, to see whether a track made by it would be similar to the track testified to as being in the lane running west from Burgoon's house; that one of the jurors stepped up to him and said: "We have been trying tracks, look here," pointing to tracks made in the dust with an old shoe, "we have been making tracks with an old shoe," pointing to a shoe then in the possession of the juror; that the affiant remarked to the juror (not at that time knowing he was a juror) that the shoe shown him was not like the sole of the boot referred to in the evidence, to which the juror replied: "It would make a track anyhow;" referring, as the affiant supposed, to the boot spoken of by the witnesses on the trial. An affidavit of the juror, Leathers, who was referred to in the above affidavit by the by-stander, was then read, which is as follows: "He was one of the juryman in the trial of Sanders; that L. P. Cunningham, in his argument after the close of the evidence, told the jury to just try worn-out boots, and see for themselves whether they would make imprints in dust or sand, as claimed by the prosecution, that boots worn-out like boots referred to in evidence would do, and told the jury they had a right to make the experiment for themselves, to satisfy their own minds on the point. The affiant then made the experiment and was seen and reported by Mr. Snyder."

An affidavit from another juror named Jessup, is found in the record, which states "that during the trial of the above cause, W. F. Leathers, one of the jurors, told him he had taken an old shoe and cut a hole in the outer

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sole and tried it in the dust, and they might talk to him as much as they pleased about a boot worn as the one testified to by the witnesses not showing the size and shape of the place worn-out, but he knew better; that he had tested that himself as aforesaid, and he knew it would show the marks of the place worn-out." What was done with this affidavit is not stated. It is well settled that jurors are not allowed to impeach their own verdict. *State v. Coupenha-ver*, 30 Mo. 430, and cases there cited; *State v. Alexander*, 66 Mo. 148.

Disregarding the affidavit of the juror Jessup, which was clearly inadmissible, we have still before us the fact that a portion of the jury experimented, with a view to ascertain a fact testified to on the trial, and to test the credibility of the witnesses who testified in regard to that fact. That such experiments by a portion of the jury, or by all the jury, are improper, without leave of the court, is incontrovertible. In some States the jury are allowed by the court, even on criminal charges, but under charge of the sheriff, to view the ground where the offense is charged to have been committed, for the purpose of determining for themselves, as to the credibility of witnesses who were examined in the case. (45 N. H. 148, *State v. Knapp*.) It is not necessary to determine in this case whether our courts have any such power. There has been, undoubtedly, some relaxation of the rules prevailing anciently in regard to juries, but I have not found any case where the jury, after the cause was submitted to them, was allowed to receive evidence which could have any bearing on the case. The question here, however, is whether, after the jury are invited by the defendant's counsel to make certain experiments for themselves, and the jury, or a portion of them do so, the defendant can, after the verdict is unfavorable, take advantage of this misconduct of the jury, invited by himself. This looks like allowing a party to take advantage of his own wrong, and therefore has caused some hesitation on our part, but upon reflection, we have con-

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cluded that the court and the attorney for the State must share the responsibility of such misstatements by allowing them to go uncontradicted. The judge, who presides at a trial of a criminal, should not allow the jury to be misled as to their duties or powers.

Indeed, regarding the affidavit of juror Leathers as a correct representation of the speech of Mr. Cunningham, it will be seen that the invitation was to the jury as a body, and not to any individual member or members of it, and it seems clear from the testimony of the by-stander, that only a portion of the jury participated in this experiment in the street upon the old shoe. It may be presumed that the result was communicated to the other jurors, thus introducing evidence on a very material point in the case, in the absence of the defendant and the court. If we consider the affidavit of Jessup, no presumption is necessary, but apart from that, the possibility of the experiment being so used is sufficient to establish its impropriety. Upon the whole, without especial regard to the present case, we are of opinion that it would be unsafe to further relax the well established rules governing the conduct of juries, and that we must, therefore, remand this case for another trial. Judgment reversed and case remanded. The other judges concur.

REVERSED.

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THE STATE, *Appellant*, v. CRUMB.

**Perjury:** FALSE RETURN TO TOWN ASSESSOR. An indictment for perjury charged the defendant with making a false affidavit to a return of his taxable personal property to a town assessor. There was no averment that the town was vested with the power to appoint an assessor and levy taxes, or that defendant was a resident of the town, or that there was any ordinance or law requiring defendant to make the affidavit. *Held*, that for want of these averments the indictment was insufficient. They ought to have been made in order to enable

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the court to determine whether the town could require the assessment of defendant's personalty, and whether it could require him to make the affidavit.

*Appeal from Stoddard Circuit Court.*—HON. R. P. OWEN,  
Judge.

*J. L. Smith*, Attorney-General, for the State.

*Bedford & Crumb* for respondent.

NORTON, J.—Defendant was indicted at the August term, 1875, of the circuit court of Stoddard county for perjury. A demurrer to the indictment was sustained, and judgment rendered for the defendant, from which the State has appealed. The indictment, in substance, alleges that one Fraker was the assessor for the town of Bloomfield, in Stoddard county, and as such required defendant to deliver to him a true list of his taxable property; that defendant, on the 12th day of June, 1875, with intent to defraud the said town of Bloomfield, made out and delivered to said assessor a false list of his property, omitting therefrom one piano, one carriage, one diamond stud and one gold watch chain, to which false list was appended an affidavit sworn to by defendant before said Fraker, in which he stated that said list was a true and correct list of all taxable property \* \* \*; that said Fraker had authority to administer said oath; that said list was a false list in that it did not include the articles of property above mentioned, and that such articles were proper subjects of taxation. It is no where alleged in the indictment that the town of Bloomfield was an incorporated town, vested with the power to appoint an assessor and levy taxes, nor is it alleged that defendant was a resident of the town of Bloomfield, nor that there was any ordinance of said town or law requiring defendant to make the affidavit, which is alleged to be false. There are no facts alleged which enable us to determine that the town of Bloomfield could require said Fraker to assess the personal property of de-



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The State v. Doepke.

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fendant, and require him to swear to the truth of a list of his property when made. In these respects, to say nothing of other defects, we think the indictment insufficient to charge the offense, and that the demurrer was properly sustained. Judgment affirmed, in which the other judges concur.

AFFIRMED.

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THE STATE V. DOEPKE, *Appellant*.

1. **Coffin—Stealing is Larceny:** STATUTES CONSTRUED. It is larceny to steal a coffin in which the remains of a human being are interred. This was so at common law; and the rule is not changed by anything contained in Wag. Stat., secs. 11, 12, 13, p. 500. Sections 11 and 12 relate only to the exhumation of the remains. Section 13 prescribes the punishment for an attempt to remove the remains, or to steal the coffin, or any article interred with the body. Neither of them provides for the case where the theft of the coffin is actually accomplished.
2. **Pleading, Criminal.** It is not necessary in an indictment for a common law offense to negative exceptions contained in a statute.
3. —: **PROPERTY IN A COFFIN.** In an indictment for the larceny of a coffin in which the remains of a human being are interred, the coffin is properly laid to be the property of the person who furnished it and buried the deceased.
4. **Larceny: VALUE OF PROPERTY.** In determining whether an offense is grand or petit larceny, the inquiry should be, not what is the value of the property stolen to the owner, but what price would it command in open market.

*Appeal from St. Louis Court of Appeals.*

This was an indictment for stealing a rosewood coffin of the value of \$35, the property of one Merkel. It appeared in evidence that Merkel had bought the coffin for \$35 for the purpose of burying his father-in-law, Gerhard Doll; that it was used for that purpose by Merkel's order that on the night after the burial defendant opened the

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grave and took out both the body and the coffin; that there had been no administration upon the estate of Doll; that when defendant was arrested the body was out of the coffin, and both the coffin and the body were in a wagon; that defendant stated that he was taking the body to be dissected. Evidence was introduced by the defense tending to show that there was no marketable value for second-hand coffins, or for such as had been used for burial purposes, and that there was no place where such coffins were bought or sold; that a coffin in which a corpse had been buried was of no value or use except for the purpose for which it was first used.

The jury found the defendant guilty of grand larceny and fixed his punishment at imprisonment in the penitentiary for two years. A motion for a new trial was made and overruled, and the defendant appealed to the St. Louis court of appeals, which affirmed the judgment of the criminal court. He then appealed to this court.

*C. C. Simmons* and *J. J. McBride* for appellant.

*J. L. Smith*, Attorney-General, for the State.

HENRY, J.—It is conceded by counsel for appellant, and fully established by the authorities, that a coffin in which the remains of a human being were interred, was a subject of larceny at common law. It is contended, however, that sections 11, 12, 13 and 14, of our act concerning crimes and punishments, Wag. Stat., pp. 500, 501, “stand in lieu of the common law as it existed in reference to the question under consideration, and that the acts alleged to have been committed by the defendant in this case, amounted to nothing more than a statutory misdemeanor.” Section 11 provides a punishment for removing the remains of a human being from the grave, or other place of interment. Section 12 makes it a misdemeanor for any one to receive such remains, knowing them to have been disinterred con-

1. COFFIN — STEALING IS LARCENY : statutes construed.

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trary to the provisions of the preceding section. These sections, it might be contended with plausibility, have superseded the common law in regard to the exhumation of the remains, but have no bearing upon the question of stealing a coffin or grave clothes. It was not larceny at common law to take a dead body from its place of interment, under any circumstances, but it was a misdemeanor, and as sections 11 and 12 expressly provide a punishment for that offense, as also for receiving the dead body, those sections may be taken to stand in lieu of the common law in relation to the removal of the remains of the dead.

Section 13 provides that "every person who shall open the grave or other place of interment, or sepulture, with intent to remove the dead body or remains of any human being for any of the purposes specified in section 11 of this chapter, or to steal the coffin or any vestment, or other article, or any part thereof interred with such body, shall, on conviction," &c. This section provides a punishment for an attempt to remove the remains or to steal the coffin or any article interred with the body. There is no enactment in regard to stealing a coffin, and with what propriety can it be said that the Legislature having prescribed a punishment for one offense, which was punishable at common law, has thereby repealed the common law in regard to a different and higher grade of offense? By the common law it was larceny to steal a coffin in which the remains of a human being were interred. It was at common law also a misdemeanor to attempt to commit that offense, and the argument urged here is, that inasmuch as our Legislature has provided a punishment for the misdemeanor it has thereby entirely superseded and abolished the common law as to the felony. We may not appreciate the force of the argument, but it comes far short of securing our assent to the proposition. That the stealing of a coffin is still larceny in this State is recognized in section 13, wherein it provides a punishment for the attempt to steal a coffin. We therefore conclude that notwithstanding the

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enactment of those sections a coffin in which the remains of a human being are interred is still a subject of larceny in this State.

It is insisted that the indictment is defective in failing to negative the exceptions contained in section 14. This question has been otherwise determined by repeated decisions of this court, and recently in the *State v. O'Gorman*, ante, p. 179.

2. PLEADING, CRIMINAL.

The coffin was alleged in the indictment to be the property of one Merkel, a son-in-law of the deceased, and it is contended that when he had the body interred he parted with all the property he had in the coffin, and that, therefore, the conviction of defendant cannot be sustained. Roscoe, in his work on criminal evidence, says: "A shroud stolen from the corpse must be laid to be the property of the executor, or of whoever else buried the deceased;" p. 604, (6th Am. Ed.); 1 Chitty Crim. Law, (5th Am. Ed.) 44; 1 Hawkins, P. C., 144, 148; Sharswood's Black., 4th vol., 235. All these authorities, it is true, speak only of shrouds and ornaments buried with the dead, but the principle upon which these may be alleged to be the property of the executor, or of the person who buried the deceased, will certainly sustain an allegation that the coffin is the property of the person who buried the deceased.

The court, for the State, instructed the jury that if they found that the coffin was of less value than \$10, and that defendant stole it, they should convict him of petit larceny. By another instruction they were told that in order to convict defendant of grand larceny they should find the coffin to have been of the value of \$10 or more, and that it was sufficient if they found it to have been of that value to the owner, and that it was not required that it should be of that value to third persons, or that it would command that price in the open market. This latter instruction was erroneous. The authorities cited to support the doctrine it announced give it

4. LARCENY: value of property.

no countenance. In 3 Greenleaf's Evidence, p. 140, section 153, the author says; "Nor is it necessary to prove the value of the goods stolen, except in prosecuting under statutes which have made the value material either in constituting the offense or in awarding the punishment. But the goods must be shown to be of some value at least to the owner, such as reissuable bankers' notes, or other notes completely executed but not delivered or put into circulation, though to third persons they might be worthless." It is clear that in the latter clause he was speaking of other prosecutions than those under statutes which make the value material, either in constituting the offense or awarding the punishment.

"By the English law, as it stood when this country was settled, larceny was divided into grand and petit; the former being committed where the goods stolen were over twelve pence in value, the latter where they were of the value of twelve pence or under." Bishop's Crim. Law, vol. 1, sec. 679. "In these valuations (says East) the valuation ought to be reasonable; for when the statute (of West. I. c., 15) was made, silver was but 20d an ounce, and at the time, Lord Coke wrote, it was worth 5s, and it is now higher." 2nd East's P. C., 736. So Lord Coke, 2 Inst. 189, says: "The things stolen are to be reasonably valued, for the ounce of silver at the making of this act was at the value of 20d, and now it is at the value of 5s and above." See also Black. Com., vol. 4, 237. The statute of Westminster, I. c., 15, referred to by these authors was that by which the distinction betwixt grand and petit larceny was made.

By St. 7 and 8, Geo. IV, c 29, sec. 2, that distinction was abolished, and every larceny, without regard to the value of the goods, was made grand larceny. Sharswood's Black., vol. 4, 230. When it is said by elementary writers, and in adjudged cases, that in order to constitute the offense of larceny, it is sufficient if the thing stolen be of some value to the owner, however small, although to third persons worthless, the observations relate to the offense of petit

larceny, or to simple larceny under the statute 7 and 8, Geo. IV, and similar statutes, and are wholly inapplicable to grand larceny. Where a distinction is made by statute between that and petit larceny, based upon the value of the goods stolen, the remarks of East and Lord Coke above quoted show conclusively that the value of the goods was to be measured by the current coin of the realm, and that the cash value was that to be ascertained in determining whether the theft was grand or petit larceny.

If the criterion of the value given by the court, in the second of the above instructions be correct, one might be convicted of grand larceny for stealing a finger-ring of the intrinsic or market value of \$5, only because, forsooth, being a gift to the owner by a departed friend, or wife or other loved one, he placed an estimate upon it far beyond its value, although of no greater value to third persons than another ring of the same kind, which could be purchased wherever kept for sale for \$5. The criterion of value by which the jury were told in that instruction they might be governed, does not apply as a general rule in civil proceedings, and when the statute requires that property stolen shall be of the value of \$10 in order to constitute the theft thereof grand larceny, the term "value" is to be taken in its legal sense, which does not differ from its common acceptance, and there is no warrant for allowing any other mode of ascertaining the value of stolen property in a criminal prosecution than that which prevails generally in civil proceedings. It is not the fancy estimate of value placed upon the property by the owner which is to determine whether the theft is grand or petit larceny, but its actual value, as that value is usually ascertained in other proceedings.

If one sue another for conversion of personal property, he recovers, not what the property was worth to him, but its value in the market; and it would be strange enough, if, when the statute declares that no one shall be adjudged guilty of grand larceny, unless the goods stolen were of the



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The State v. Rugan.

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value of \$10, a criterion of value should be adopted which would authorize a conviction for that offense, when the goods stolen are worthless to third persons, and of no market value, but possess a value which can only be measured by fancy or sentiment, a measure of value as uncertain and variable as the whims and caprices of the owner of the goods, or the witnesses he may introduce to prove their value. We cannot substitute this for the stable and certain measure furnished by the price which such goods command in the market. In some civil cases, we are aware, the jury are allowed to consider *pretium affectionis*, in estimating the value of property, but the reason for the departure from the general rule in those cases does not apply in a prosecution for stealing such property. The purpose of the prosecution is to punish the thief, not to compensate the owner of the property for his loss. The judgment of the court of appeals is reversed and cause remanded. All concur.

REVERSED.

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THE STATE. *Appellant*, v. RUGAN.

1. **Witness: PRACTICE, CRIMINAL.** When the defendant in a criminal case testifies in his own behalf, he stands on the same footing as any other witness, and is subject to the same rules and tests, (following *State v. Clinton*, 67 Mo. 380).
2. **A former Conviction** can only be proven by the record.
3. **Practice, Criminal: WAIVER.** A defendant in a criminal case does not, by answering an improper question asked of him upon cross-examination by the State's attorney, waive any objection to the question which has been made by his attorney and overruled by the court before he made the answer.

*Appeal from St. Louis Court of Appeals.*

*J. L. Smith*, Attorney-General, for the State.

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The State v. Rugan.

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*F. D. Turner* for respondent.

SHERWOOD, C. J.—Defendant was indicted for, and convicted of, an assault with intent to kill, and appealed to the court of appeals, where the judgment being reversed, the State appeals here. The case of the *State v. Clinton*, 67 Mo. 380, settled the point that under the recent statute, a defendant who offers himself as a witness occupies the same footing as any other witness, and is, therefore, subject to the same rules and tests. For this reason the defendant having answered on examination in chief that the scar on his forehead was produced by the prosecuting witness, Maxwell, it was competent for the attorney for the State to ask, on cross-examination, whether it was not true that the scar was caused by the club of an officer, when arresting defendant on a charge of burglary and larceny.

But we cannot give our sanction to the question propounded to the defendant in relation to his former conviction. The best evidence of that was the record of the judgment of conviction, and the only evidence that could be received of the fact, if objections were made, as they were, in the present instance. 1 Greenl. Ev., §§ 377, 457.

Nor do we think that any waiver of the right to insist on the best evidence has occurred. The objection of defendant's attorney had been overruled, and he only bowed in obedience to the ruling of the court, when directing the defendant to conform to that ruling and answer the improper question. A defendant on trial under a criminal charge, who offers himself as a witness, occupies a very delicate position; if he fails to answer with promptness any question whatever that the court decides he should answer, his very hesitancy, though resting on the most solid and valid objections, does him a world of damage with the jury. If the State's attorney had the record of defendant's conviction under his control, it was a

f. WITNESS: practice, criminal.

2. A FORMER CONVICTION.

3. PRACTICE, CRIMINAL: waiver.

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Leeper v. Lyon.

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very easy matter for him to have produced it, and thus have saved the State the expense of another trial of this cause, which seems to have been otherwise very fairly tried. As it is, however, we do not feel at all disposed to give encouragement to such an irregular method of cross-examination when the accused is himself a witness. We, therefore, affirm the judgment of the court of appeals. All concur.

AFFIRMED.

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LEEPER v. LYON, *Appellant*.

1. **Equity Practice.** The trial court having taken the verdict of a jury upon two of the issues presented by the pleadings in an equity case, adopted the verdict and rendered judgment upon the whole case without trying the remaining issues. *Held*, that this was error.
2. **Vendor's Lien: NECESSARY PARTY TO A SUIT.** When the administrator of a vendor of real estate who has died without making a conveyance, brings suit for the purpose of enforcing a vendor's lien for the unpaid purchase money, the heirs of the vendor should be made parties, and their presence cannot be dispensed with by tendering, either in the pleadings or at the trial, a deed from the heirs to the vendee, unless the vendee accepts the deed.

*Appeal from Livingston Circuit Court.*—HON. E. J. BROADBUSH, Judge.

Plaintiffs brought this suit as administrators of John B. Leeper, deceased, upon a note executed by defendant in favor of said Leeper, the consideration of which was a title bond by which Leeper bound himself to make a deed to defendant for certain real estate when the note should become due, provided it was then paid. The petition described the land to be conveyed, and tendered to the defendant a deed for certain land, alleging that it was the same land, that the deed was executed by each and all the heirs of Leeper, and that each and all of them were of age and

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competent to make it. It then prayed judgment against the defendant for the amount of the note with interest, and that the land be sold to satisfy the debt.

The answer denied that the land described in the deed tendered was the same as that described in the title bond, and averred that defendant, in the life-time of Leeper, tendered him the amount then due on the note, delivered the title bond to him and demanded a deed for the land described in it, but he refused to receive the money, and refused to execute the deed. It further denied that all the heirs of Leeper were of age or competent to make a deed.

When the case came on to be tried, by agreement, the following issues of fact were framed and submitted to the jury: 1st. Is the land described in the deed tendered in court the same land described in the title bond from John B. Leeper to defendant? 2nd. Did the defendant, in the life-time of the said John B. Leeper, tender to the said Leeper and deliver to him said title bond and offer to pay for the land therein described, and demand a deed for the same from said Leeper? If so, did said Leeper fail and refuse to make said deed? The jury found for the plaintiffs on both these issues, whereupon the court proceeded to render judgment, on the whole case, for the amount of the note and interest, and ordered the vendor's lien enforced. There was no trial and no finding upon the issues presented by the pleadings, as to the age and capacity of the Leeper heirs. Defendant appealed from the judgment.

*Waters & Winslow* and *John Dixon* for appellant.

*Pollard & Chapman* for respondents.

HOUGH, J.—This was a proceeding in equity, and as all the issues made by the pleadings were not submitted to the jury, the court should have proceeded, after their verdict was rendered on the issues which were submitted to them, to try the remaining issues, and its action in adopting the finding of the jury and en-

1. EQUITY PRAC-  
TICE.

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tering up judgment on the whole case, without doing so, was erroneous.

When the administrator of a vendor of real estate, who has died without making a conveyance, brings suit for the purpose of enforcing a vendor's lien for the unpaid purchase money, the heirs of the vendor should be made parties, and their presence cannot be dispensed with by tendering, either in the pleadings or at the trial, a deed from such heirs to the vendee, unless the vendee accept such deed. The mere tender of the deed cannot have the effect of investing the vendee with the legal title. In order to decree the sale of real property in a proceeding to enforce a vendor's lien, the holders of the legal title must be made parties. *Perry v. Roberts*, 23 Mo. 221; *Siemers v. Blechburg*, 56 Mo. 196; *Story's Eq. Plds.*, (7 Ed.) §§ 160, 172 a. The judgment of the circuit court will be reversed and the cause remanded. All the judges concur.

REVERSED.

#### WHITE, Appellant, v. GRAVES.

1. **Replevin:** FORM OF JUDGMENT FOR DEFENDANT. In an action for the recovery of specific personal property, the plaintiff was put in possession under the writ, and, pending the suit, sold and disposed of the property. The cause coming on to be tried, the decision was in favor of the defendant, who, thereupon, waived his right to have the property returned to him, and elected to take judgment for its value in money, and the judgment was entered accordingly. Plaintiff complaining because the judgment did not order the return of the property or the payment of its value, in the alternative, as provided by Wag. Stat., sec. 12, p. 1026; *Held*, that the judgment was proper. Defendant had a right to make his election before the entry was made, especially in view of the fact that it was out of plaintiff's power to return the property.
2. **Chattel Mortgages, when void as to Creditors.** A mortgage upon a stock of goods which provides that the possession of the

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goods shall remain with the mortgagor, is void as against creditors, although recorded, unless it is acknowledged or proved as deeds conveying real estate are required to be acknowledged or proved. Wag. Stat., sec. 8, p. 281. So is one which allows the goods to be disposed of by the mortgagor in the usual course of business, (following *Lodge v. Samuel*, 50 Mo. 204, and other cases).

3. **Replevin: HUSBAND AND WIFE.** When a defendant in an action for the recovery of specific personal property claims the right to the possession as agent for his wife through a chattel mortgage in her favor and a sale thereunder, it is not necessary for him, in order to make good his defense, to show that the money secured by the mortgage was the separate property of his wife, or that the purchase at the sale under the mortgage was made to her use.
4. **Estoppel: MORTGAGE.** A purchaser at a sale under a mortgage is not precluded from denying the validity of an older mortgage by reason of the fact that the auctioneer announced that the sale would be made subject to the older mortgage, and in consequence of this announcement the property was sold at much less than its real value.
5. **Instructions.** It is no error to refuse an instruction which seeks to submit to the jury a question already properly submitted by another instruction, or one which places the party's right to recover on a different ground from that presented by the pleadings and the evidence.

*Appeal from Carroll Circuit Court.*—HON. E. J. BROADBUSH,  
Judge.

This was an action instituted February 19th, 1875, against Graves and Heidel, to recover possession of a stock of goods alleged in the petition to be detained by them. The answer denied the allegations of the petition, and averred that the goods were the property of Lavina A. Heidel, wife of defendant Heidel, and that he alone was in possession as her agent and business manager. The plaintiff having given bond, the property was taken by the sheriff and delivered to him, and, pending the suit, was sold by him for \$1,486, part of the purchase money being taken in property at an estimated value.

It appeared in evidence that on the 13th day of November, 1874, plaintiff sold Graves the property in question, taking a chattel mortgage on it to secure notes to the



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amount of \$1,200, given for part of the purchase money. This instrument described the property as "all my stock of dry goods, boots and shoes, hats and caps, and stock in trade generally now in Henry's building in Moberly, \*

\* which stock I am now preparing to move to Dewitt, to remain as stock in trade," and was recorded January 20th, 1875. It was never acknowledged nor proved. Immediately after making the purchase Graves removed the goods to Dewitt, and, on the 2d day of December, 1874, executed another chattel mortgage on the same stock in favor of Mrs. Heidel, to secure a note of \$1,000. This mortgage was not acknowledged, but it was recorded January 12th, 1875. The property was sold under it January 18th, 1875, and at the sale defendant Heidel bid it off in bulk at \$350. Plaintiff claimed that this mortgage was without consideration, and the mortgage and the sale thereunder were fraudulent, and that Heidel was a party to the fraud, and gave evidence tending to support his claim; also evidence tending to show that it was announced by Guillett, the trustee, at the sale, that the goods were sold subject to plaintiff's mortgage. Defendant gave evidence to the contrary of all this, and also evidence of the value of the goods when they were taken by the sheriff.

Plaintiff presented several declarations of law, which were given by the court, among which was the following: 2. The plaintiff is entitled to recover the stock of goods sued for, unless it has been established by the evidence that defendant Heidel, or his wife, took the chattel mortgage on said stock in good faith.

The following declarations of law, presented by the plaintiff, were refused: 1. That, as against defendant Graves, the finding should be for plaintiff, the execution of the mortgage by him, and the fact that plaintiff's debt secured by the mortgage was due and unpaid at the date of the commencement of this suit, having been proven and not controverted by defendant, if said Graves was in possession of the property sued for when the suit was com-

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menced; and although the court may find that plaintiff's mortgage was void, as to Heidel, or his wife, yet if said Heidel was not in possession of the goods at the commencement of the suit, the verdict and finding for him should be only nominal and judgment rendered only for costs; and Heidel should be remitted to an action on the bond against plaintiff, or trespass for taking the goods. 6. There is no evidence in this case that the money alleged to have been paid to Graves was the separate property of L. A. Heidel, or that the alleged purchase was to her separate use. 8. That if the goods were sold by Guillett and purchased by Heidel, subject to White's lien, and Heidel purchased said goods at said sale at a price much below their real value by reason of their being sold in that manner, Heidel is estopped from denying in this suit the right and title of plaintiff. 10. If the mortgage to Heidel was made with intent to defraud the prior creditors of said Graves, even if a valuable consideration was paid by Heidel, then the same is and was void as to such creditors.

The court, sitting as a jury, found the goods were the property of defendant Heidel, in right of his wife, and not the property of plaintiff, and assessed their value at \$1,039.50, and, defendant Heidel, electing to take their value, judgment was rendered in his favor for that amount, and for defendant Graves for costs, and plaintiff appealed.

*Hale & Eads* for appellant.

*Waters & Winslow* with *John L. Mirick* for respondents.

NORTON, J.—The judgment is sought to be reversed in this case on two grounds, first, because it was not in accordance with the statute; second, because of the refusal of the court to give instructions asked by plaintiff numbered one, six, eight and ten. The action is for a specific recovery of a stock of goods, which were invoiced to defendant Heidel, by defendant Graves, at \$1,900. The evi-

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dence shows that plaintiff, after he was put in possession of the goods by virtue of the writ, sold them for \$1,486. The cause was tried by the court, which found that the stock of goods was the property of defendant Heidel in right of his wife, that plaintiff was not entitled to the possession thereof, that the value of the goods taken and delivered to plaintiff was \$1,039.50, that the goods had been sold and disposed of by plaintiff so that they could not be returned, and defendant Heidel, electing to take the value of the goods as found by the court, judgment was rendered against plaintiff and his securities, in favor of Heidel, for the said sum of \$1,039.50.

It is argued that under Wag. Stat., secs. 11, 12 and 15, p. 1026, the judgment should have been that plaintiff return the property taken or pay the assessed value thereof, at the election of defendant, and that this election could only be made by him when the property was delivered to the sheriff. We think the form of the judgment can be upheld under the authorities of the case of *Dilworth v. McKeley*, 30 Mo. 149. Besides this, we cannot see how the plaintiff, in the light of the facts of the case could possibly be injured by the action of the court in allowing defendant to elect to take judgment for the assessed value of the property. It is shown by the evidence of plaintiff himself that he sold the goods in controversy after receiving them under the writ for \$1,486, nearly \$450 in excess of their value, as ascertained by the court. He cannot, therefore, be heard to complain. While in actions of this character under section 15, *supra*, a party shall not be required to make his election whether he will take the property or its assessed value till it is delivered to the sheriff, yet if he choose to give up a privilege, and make such election, we can see no reason why he should not be allowed to do so, especially in a case like this, where the evidence shows that it is out of the power of the opposite party to return the property.

The declarations of law numbered one, six, eight and

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ten, we think were properly refused. Plaintiff bases his right of recovery on a mortgage executed by Graves to him on the 13th day of November, 1874. This mortgage, though it was recorded, was neither proved nor acknowledged as deeds conveying real estate are required to be proved or acknowledged, and under its terms the mortgagor was to remain in possession of the mortgaged goods. It was, therefore, fraudulent and void as to creditors. Wag. Stat., § 8, p. 281; *Bevans v. Bolton*, 31 Mo. 437; *Bryson v. Penix*, 18 Mo. 13; 13 Met. 304. It was also void as to creditors for another reason. It conveyed a stock of dry goods, hats and caps which were to be removed by the mortgagor from Moberly to Dewitt, and remain as stock in trade. It thus appearing from the face of the mortgage that the goods were to remain in possession of the grantor and be disposed of in the usual course of business, the deed was void. *Billingsly, admr., v. Bunce*, 28 Mo. 547; *Brooks v. Wimer*, 20 Mo. 503; *Walter v. Wimer*, 24 Mo. 63; *Lodge v. Samuel*, 50 Mo. 204. As between defendant Graves and plaintiff, the mortgage had validity, and had Graves been in the sole possession of the goods when this suit was instituted, plaintiff might have recovered as against him. The petition, however, charges that the goods were in the possession of Graves and Heidel, and the evidence tended to show that they were in the sole possession of Heidel, either as creditor of Graves, under a mortgage from Graves to Heidel to secure a debt contracted subsequently to the date of plaintiff's mortgage, or as purchaser at a sale made under his mortgage by one Guillett. We, therefore, think the first instruction was rightly refused.

We cannot perceive the relevancy of the point presented in the sixth instruction to the question in issue. It matters not whether the money paid to Graves was the separate property of Lavina A. Heidel, or the purchase of the goods was to her use. It could neither strengthen plaintiff's case nor weaken the

2. CHATTEL MORTGAGES, WHEN VOID AS TO CREDITORS.  
3. REPLEVIN: husband and wife.

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defendant's if he was in fact in possession, in the rightful possession of the goods when the suit was commenced.

The eighth instruction may well have been refused on the ground that if White had no valid lien on the goods the declaration of Guillelt, the auctioneer, could not confer one.

4. ESTOPPEL: mortgage. The second instruction having submitted the question of the good faith of Heidel in lending the money to Graves and taking the mortgage to secure its payment, affords a sufficient reason for refusing the tenth declaration. It might also have been refused on the ground that plaintiff did not stand before the court as a creditor, but as one basing his right to recover on a mortgage void as to creditors. Discovering no error, the judgment is affirmed, with the concurrence of the other judges.

AFFIRMED.

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CAHO *et al.*, Plaintiffs in Error, v. ENDRESS.

**Majority of Married Women:** DEED. Under the General Statutes of 1865 a married woman was of full age for the purpose of executing a deed when she attained the age of eighteen years. Construing sec. 1, p. 466 and sec. 1, p. 444.

*Error to Perry Circuit Court.*—HON. LOUIS F. DINNING, Judge.

This is an action of ejectment brought by Mary Caho and Henry Caho, her husband, to recover a tract of land in Perry county. The land originally belonged to Mrs. Caho, but in February, 1871, she and her husband conveyed it to defendant, Endress. At the time of making this conveyance she lacked a few days of being twenty-one years of age. This suit was brought upon the theory that she was not then of full age for the purpose of executing a

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deed, and had a right to avoid this conveyance. The court below, however, ruled otherwise, and gave judgment for the defendant. From this judgment plaintiffs appealed.

*B. B. Cahoon* for plaintiffs in error.

*J. C. Killian* for defendant in error.

NAPTON, J.—The principal question in this case is whether a married woman can avoid a deed for her real estate, made by her and her husband, when she was over eighteen and under twenty-one years of age.

That the infancy of a married woman will make her deed voidable, notwithstanding its execution in the form prescribed by our statute in regard to privy examination, is well settled by the uniform decisions of this court from the case of *Youse v. Norcom*, 12 Mo. 549. down to the latest decision on the subject. *Peterson v. Laik*, 24 Mo. 541; *Schneider v. Staihr*, 20 Mo. 271; *Baker v. Kennett*, 54 Mo. 83; *Huth v. Carondelet M. R. & D. Co.*, 56 Mo. 208. This appears to be also well established elsewhere, and Chancellor Walworth, in *Sandford v. McLean*, 3 Paige 117, explains the reason of the distinction. "The statute," says the Chancellor, "which makes valid the deed of a *femme covert* when executed with her husband, and acknowledged by her on a private examination, was never intended to sanction or validate a conveyance by an infant wife. There is a plain and obvious distinction between the disability of a coverture and that of infancy. The first arises from a supposed want of will on account of legal power and coercion which the husband may exercise over the volition of the wife. This disability is removed by the private examination of the wife in the absence of her husband, by which it is legally ascertained that such power and coercion has not been exercised in that particular case. But the disability of infancy arises from the supposed want of capacity and judgment in the infant to contract understandingly." See also *Hoyt v. Sear*, 53 Ill. 134.



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The only question then is, whether the disability of infancy existed in this case, and it must be conceded that the determination of the question is involved in difficulties, considering the various statutes that have been passed and the necessity of reconciling them as far as possible. The first section of the act "concerning curators, guardians and wards" in the revised code of 1865, declares that, "males of the age of twenty-one years, and females of the age of eighteen years shall be considered of full age for all purposes, and until these ages are attained they shall be considered minors." Giving the words "for all purposes" a literal interpretation, it would seem without further examination that but one conclusion could be reached; but it is evident from an examination of other acts in the same code that these words must be restricted to some extent. The fourth section of the statute of limitations reads that "if any person entitled to commence any action in this chapter specified, or to make any entry, be, at the time such right or title shall first descend or accrue, either within the age of twenty-one years, or," &c. This exemption from the operation of the statute obviously extends to females as well as males, and the period when it ceases is clearly the age of twenty-one without regard to sex. The first section of the act concerning guardians, &c., must then have a restricted meaning, so far as the statute of limitations is concerned, for this act uses the words twenty-one years, as equivalent to the attainment of majority in either sex, and the two statutes cannot be reconciled except by a restricted construction of the words "for all purposes" in the act concerning guardians, and I presume the Legislature had no intention of changing the old law in regard to limitations.

In the same code of 1865 is found a statute concerning wills, which, in its first section, declares that "every person of twenty-one years of age, or upwards, of sound mind, may, by last will, devise all his estate, real, personal and mixed, and all interest therein," &c. Perhaps this section was intended only for males, as the words "his estate"

are used, but the words "every person" would apply to both males and females. However, in the same revision in the act concerning married women, (sec. 13, chap. 115,) it is also declared that "any married woman may devise by her last will and testament, her lands, tenements or any descendable interest therein, provided that the same shall not affect the estate of her husband therein by the courtesy." Under this act in 1865, it is obvious that a married woman could devise her lands long before she was eighteen years of age, since she was by the common law, deemed to have attained the age of puberty at twelve, and could consent to a valid marriage at that age, and although our statute concerning marriages prohibits a judge, justice or licensed minister from solemnizing marriages of females under eighteen, without the consent of parents or guardians, it does not declare such marriages void, and a marriage by a female under eighteen, with consent of her parents, is unquestionably valid. So that it is clear that under the law of 1865, previous to its amendment in 1868, (Sess. Acts, p. 57,) a married woman, though under the age of eighteen, was authorized to devise her lands. This privilege, however, was no where extended to unmarried females, even after the restriction made in 1868. The act concerning wills makes no distinction between males and females.

I have referred to these statutes concerning wills and limitations, to show that so far as the subjects provided for in them are concerned, the sweeping clause, in the act concerning guardians and curators, must be understood with some modification. But the point in the case now under consideration relates to conveyances only, and we must look at the statutes regulating them, in order to determine whether that act in 1865, so modified the admitted law previous to it, as to conform it to the first section of the act concerning guardians, &c.

The first section of the act concerning conveyances in the revision of 1865, is as follows: "Conveyances of land or of any estate or interest therein, may be made by deed,

executed by any person having authority to convey the same, or by his agent or attorney, and acknowledged and recorded as herein directed, without any other act or ceremony whatever." This section is a new one, and so, also, is the first section of the acts concerning guardians, &c. It will be seen that the section makes no specific reference to any disability. It obviously includes both sexes, although the words "his agent," &c., are used, and makes no reference to age at all, but simply declares that deeds may be executed by any one having authority to convey. That previous to this revision, neither males nor females could convey before twenty-one, is unquestionable, but it may be that this section was designed to recognize the distinction between the period of majority of either sex, as fixed in the first section of the guardian law.

Both sections were introduced for the first time into the code, and it is not impossible to reconcile them. It is certainly singular, if it was the design of the Legislature to make so material a change in the law of conveyances, that it was not plainly and specifically done in terms, and it is equally strange that unmarried females are not allowed to make testamentary devises till twenty-one, whilst married women were authorized to make them before eighteen as the law stood in 1865, and after eighteen as the law was amended in 1868. We have, however, concluded, after some hesitation, that the addition of the first section to the law of conveyances, may be reconciled with the first section of the guardian law, by understanding the former as a recognition of the change made by the latter, and, therefore, allowing all females, married and unmarried, to convey their real estate. No distinction is made between married and unmarried females, and as the disability of infancy is not removed by marriage, no distinction in this respect could properly be made, though it is made in regard to wills. In so important a matter, and one in which the ancient law was so well understood, the change ought to have been made in terms, that would have admitted of no miscon-

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struction. As it is, we have concluded that it was the intention of the Legislature, in the act concerning conveyances, to adapt it to the change made in the guardian law, in respect to the period of majority, although the question admits of reasonable doubts, and the conclusion of the court had been reached with much hesitation, on the part of some of its members.

This view of the subject renders unnecessary any consideration of the question involved in the refusal of the circuit court to give the second instruction. Judgment affirmed.

AFFIRMED.

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THE STATE *ex. rel.* POLK COUNTY, *Appellant*, v. WEST.

1. UPON an examination of the evidence, the court affirms the judgment of the court below, holding that the weight of evidence is against the appellant.
2. **Laches.** The testator of defendants having bought certain land in his own name at a sale made by order of the county court on the 23rd day of April, 1873, to satisfy a school mortgage, on the 20th day of September, 1873, sold it at an advance, and, on the 2nd day of January, 1874, died. The county court knew of the purchase by the deceased soon after it was made. On the 18th day of June, 1874, the county brought this suit to recover of defendants the profits made by deceased on the re-sale, claiming that he was acting as agent of the county. *Held*, that if the county ever had a cause of action it had been guilty of such laches as made it doubtful if this suit could be maintained.

HOUGH, J., dissented, holding that there was no laches.

*Appeal from Polk Circuit Court.*—HON. R. W. FYAN, Judge.

*D. P. Stratton* and *T. J. Rechow* for appellant.

*John D. Abbe* and *Waldo P. Johnson* for respondents.

SHERWOOD, C. J.—One James Miles owned certain land

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in Polk county. He mortgaged the land to secure debts to the amount of about \$3,000, due the school fund of the county. The county foreclosed its mortgages, and the land brought some \$1,400, the deed of the sheriff being made to one J. B. Burros, now deceased, who, at the time of the sale, was clerk of the county court. Burros, in a short time, re-sold the land for \$2,500.

The object sought in the present proceeding, an equitable one, is to recover from his legal representatives the amount of \$1,200, alleged to have been fraudulently realized by Burros, by reason of the sale for the sum last mentioned, and by reason, also, that in the purchase made he was acting as the agent of the county and betrayed his trust by purchasing the land for himself, and by suppressing bidding. The cause was twice heard, once in the probate court and once in the circuit court, resulting in each instance in a judgment for defendants. There was no agency on the part of Burros, as to the Miles land shown by but one witness, Milliken, who only states in general terms that he and Burros had agreed, in the presence of Judge Murray, of the county court, to buy in the lands that would be sold under various mortgages, if they did not bring the debts; but Judge Murray, who recollected the conversation mentioned by Milliken, says that in that conversation Burros expressed a desire to buy in the Miles land for himself; asked the judge's advice, who told him that he would be safe to buy in the land for \$1,400 or \$1,500. There was other testimony showing that Burros acted as the agent of the county, in bidding other tracts of land for the county, but there was no testimony showing that Burros agreed to buy in the Miles land for the county, except the general statement of Milliken, and the equally inconclusive statements of Judge Barnett, another member of the county court, who "got that impression some way" that Burros was to bid in the Miles land for the county. But even Barnett admits that he knew then, that Burros desired to buy the land for himself. Under such circumstances, we

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are disposed to place the greatest reliance upon the statement of Judge Murray, that as to the Miles land, Burros distinctly avowed his intention of bidding it in for himself. And the fact that he consented to act, and did act as the agent of the county in bidding in other lands, is by no means inconsistent with the idea of declining such agency in respect of the Miles tract.

It has been suggested by counsel that there was no agency in any event, because, under the ruling in *Ray County v. Bentley*, 49 Mo. 242, the county had no authority to purchase land at such sale, and, therefore, could delegate none. We do not take this view, nor are we influenced by such considerations, for the reason that whether the county could thus purchase or not is entirely immaterial, since, if a party assumes to act as an agent, it does not lie in his mouth to deny the validity of his appointment, and thus shelter himself from responsibility. But we base our conclusion as to Burros' alleged agency upon the vague and indeterminate nature of the testimony adduced in this regard, on the part of plaintiff, and the very satisfactory and definite evidence introduced on behalf of defendants. In relation to the charge that Burros suppressed bidding for the Miles land, we find no testimony in the record save that of Snodgrass, who had a judgment against Miles of \$300, rendered subsequently to the mortgages to the county, and who says that he had an agreement with Burros not to bid on the Miles land, if the latter would pay off that judgment. Such an agreement was certainly not proper, but it was barren of results, as the land was bid in by Eidson at a much higher bid than any given by Burros, who afterwards bought Eidson's bid for \$50 advance. The testimony clearly established that there was not the slightest collusion between Eidson, who was one of Miles' sureties, and Burros, but that Eidson was acting independently, and in his own behalf, in order to protect himself as well as his co-sureties. Besides, it does not appear that Snodgrass would have bid, or that the land would have brought more



at sheriff's sale than the amount bid by Eidson. Indeed, one witness, Watson, states that he quit bidding when he had run the land up to \$900, as that was all he considered the land worth. This being the case, we cannot say that the county has been injured by the abortive agreement entered into between Burros and Snodgrass, because, in order to warrant a recovery or relief on the ground of fraud, it must be shown that injury has resulted therefrom; in other words, both fraud and injury must concur in order to recovery. In addition to that, as there was no collusion between Eidson and Burros in the purchase made by the former, it was just as competent for Burros to purchase from Eidson, as for any one else to do so, and this is especially the case, as we do not, as already stated, regard Burros as the county's agent in the purchase of the Miles land.

But granting that Burros was agent of the county; granting that he suppressed bidding; granting this resulted in injury to the county, still it is by no means clear that the present proceeding should be successful, and for this reason: A court of equity does not lend a helping hand but to the prompt and vigilant. Here the fact of Burros' purchase was known to the county court, within a short time after it occurred, and yet no complaint was made or suit instituted until months afterwards, when Burros' lips were sealed in death. Under such circumstances, the laches must, of itself, be held fatal, for it would be to assert a doctrine to the last degree hazardous, to say that a complainant with full knowledge of all the facts on which he relies, can lie quietly by until death comes to his assistance and puts the seal of perpetual silence upon the lips of his adversary.

Again, this cause has been twice heard in the lower courts; courts well acquainted no doubt with the witnesses and with what weight should be accorded to their testimony. We should, therefore, defer somewhat to their conclusions, and refuse to interfere unless in a case which indicates far more plainly than the present, that erroneous

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conclusions have been reached. Judgment affirmed. All concur.

AFFIRMED.

HOUGH, J.—I concur in affirming the judgment on the ground that it does not sufficiently appear from the evidence that Burros ever undertook to act as the agent of the county in the purchase of the land in question. Nor does it appear that the county was in any way injured by the agreement between Burros and Snodgrass about bidding for the Miles land. To apply, however, the doctrine of laches to a case like this is going far beyond any decision ever made in England or America, of which I have any knowledge. It is tantamount to denying equitable relief to any person who originally demands it from the heirs or legal representatives of a dead man. I fail to find any evidence in the record tending to show that the county court waited for Burros to die before instituting this suit. Burros bought the land on the 23rd day of April, 1873. The sale by which he was charged to have fraudulently realized the sum of \$1,200, was made by him to Mary Butcher on the 20th day of September, 1873. He died on the 2nd day of January, 1874, and this suit was instituted on the 18th day of June, 1874, long before the period fixed by the statute of limitations for instituting such suits had elapsed. It is a strange rule of equity which converts the death of one liable to a civil action, into laches on the part of his legal adversary. The providence of God accuseth no man.

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The State to use of Carroll County v. Roberts.

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THE STATE *to the use of Carroll County* v. ROBERTS *et al.*,  
*Plaintiffs in Error.*

**Sureties on Collector's Bond:** EFFECT OF LEGISLATION EXTENDING TIME FOR SETTLEMENT. A change in the law by which the time for the annual settlements of county collectors is fixed a month later than that provided in the former law, and additional time is allowed in which to pay after settlement, operates to release the sureties on a collector's bond executed before the change. The effect of such a change is to postpone the State's right of action against the collector; and the rule that an extension of time given to the principal releases the surety, applies as well between the State and an individual, as between individuals.

*Appeal from Carroll Circuit Court.*—HON. E. J. BROADBUSH,  
Judge.

*Hale & Eads* for plaintiffs in error.

HENRY, J.—Roberts was elected sheriff of Carroll county at the general election held in November, 1868, for the term of two years. By his election and qualification as sheriff, he became *ex officio* collector of the State and county revenue, and as such executed the bond which is the foundation of this action against him and his securities thereon.

The law in force at the date of the bond, relative to the question involved in the controversy, is to be found in the general statutes of 1865, sec. 10, p. 113; secs. 44, 52, pp. 117, 118, and the session acts of 1870, secs. 3, 6, p. 121. The condition of the bond executed by defendants is in conformity to the requirement of section 10, page 113, and is that the collector "will faithfully and punctually collect and pay over all the State and county revenue for the year next ensuing his appointment, and that he will, in all things, faithfully perform all the duties of his office as collector according to law." Section 44, page 117, provided that "at the term of the county court, to be held on the 3rd Monday in December, (except in St. Louis county, &c.)

the collector shall return the delinquent list under oath or affirmation, to such court, and settle his account of all moneys received by him on account of taxes and other sources of revenue, and the amounts of such delinquent list, or so much thereof as the court shall find properly returned delinquent, shall be allowed and credited to the collector on his settlement." Section 52, "every collector, except the collector of St. Louis county, shall annually, within thirty days after his settlement on the third Monday in December, with the county court, settle his account with the State auditor and pay into the State treasury the whole amount of the revenue and other funds with which he may stand charged, after deducting his commissions and mileage; and the treasurer shall give duplicate receipts for the amount paid, one of which shall be deposited with the auditor."

By the act of 1870, section 44 was so amended by section 3 as to require the settlement by the collector to be made with the county court on the 3rd Monday in January instead of the 3rd Monday in December, and section 52 was so amended by section 6 as to require the payment into the State treasury by the collector within thirty days after the settlement contemplated by section 3 of the balance of all revenues then due to the State, &c.

It is contended by the securities, that this extension of time for the settlement by the collector, discharged them from liability on the bond. As between individuals, if the creditor for a valuable consideration, agree with the principal debtor to extend the time of payment or the demand without the consent of the sureties, they are discharged from liability. Is the same principle applicable to the State as a creditor? It may be urged that the State, receiving no consideration for the indulgence, does not by an act of the General Assembly extending the time, thereby release the securities. It may be answered that the only reason why, as between individuals, there must be a valid agreement to extend the time in order to release sureties

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who have not consented to the extension is, that otherwise it is not obligatory upon the creditor and his right to demand and sue for the debt is not suspended, there being no way except by a valid contract to make a promised extension binding upon the creditor. But the acts of the General Assembly are binding upon every citizen and every officer of the State, and by a legislative enactment the extension is as effectual as an extension secured by a valid contract between an individual creditor and his debtor. The fact that acts of the General Assembly of this character are repealable at the pleasure of that body, cannot affect the question, because the suspension of the right of the State to sue upon her demand, has been accomplished from the date of the approval of the bill until its repeal, and if the right of the creditor to proceed against the principal is postponed but for a day, as between individuals, it as effectually discharges the sureties as if it had been suspended for a month or a year.

The State cannot, by a legislative act, materially modify a contract between herself and a citizen, any more than she can impair the obligations of a contract between citizens. The Legislature cannot increase or vary the obligations of a citizen in a contract entered into by him with the State, and the effect of such legislation as we are considering, if it does not release the security, is to extend his liability on the bond for a longer period of time than he agreed to be bound, and to increase the risk he has taken beyond that which he assumed when he executed the bond. By the law, when the obligation was entered into, the collector was required to settle with the county court on the 3rd Monday in December. By the act of 1870, that settlement was postponed to the 3rd Monday in January. No officer in the State, nor any judicial tribunal could, after the act of 1870, demand of the collector a settlement before the 3rd Monday in January, or the payment of the balance of moneys then in his hands within thirty days after such settlement; and to hold the securities liable, under these

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circumstances, would be to declare that the State, by an act of the Legislature, may extend the time for which the securities have agreed to be bound for the principal, and by thus modifying the contract, hold them liable for risks which they did not agree to take. The State has no more right or authority to change a contract betwixt her and an individual, than she has to compel the individual to make such a contract in the first instance.

A fundamental principle of constitutional law underlies the application of this doctrine to the State, as well as the familiar principle of the common law, upon which the securities rely. It is true, as is said in some of the cases, that the time fixed by law for the settlement by the collector at the date of the bond, is no part of the contract. It is no part of the contract, in the sense, that if in consequence of the negligence of those officers who are required to settle with the collector, or for any other reason, except an interposition by the State by legislative enactment preventing it, the settlement should not be made at the time required by the law in force at the date of the bond, such failure would operate to discharge the securities. Laches is not imputable to the State, and this is the doctrine announced by the Supreme Court of the United States in *United States v. Kirkpatrick*, 9 Wheat. 720; *United States v. Vanzandt*; *United States v. Nicholl*, 12 Wheat. 509; *United States v. Boyd et al.*, 15 Peters 187, 208.

These cases are cited by the Virginia court of appeals in the *Commonwealth v. Holmes*, 25 Grat. 771, in support of the doctrine that the securities are not released in a case like the one under consideration; but we submit, that, except the case in 9th Wheaton, they only hold, as above indicated, that mere neglect to call the officer to a settlement at the time prescribed by the law, will not release the securities; that laches is not imputable to the government. In 9th Wheaton, *United States v. Kirkpatrick*, the Supreme Court of the United States, so far from holding the doctrine of the Virginia court, expressly decided "that the



liability of the sureties was strictly confined to the duties and obligations created by the acts passed antecedent to the date of the bond." The court also remarked, the opinion being delivered by Judge Story: "There is nothing in the original act, under which the appointment was made, which contemplates a permanent and continuing liability for all duties under all laws which might be subsequently passed."

The *People v. Jansen*, 7 John. 332, was an action of debt on a bond executed by defendant's father, in his lifetime, on the 18th day of April, 1786, as one of the securities of Christian Tappen, one of the loan officers of Ulster county. The defense was that no deficiency on his part appeared to have been taken notice of by the supervisors until the year 1795, and no steps were taken by the supervisors to remove the loan officers, and they were not removed until January, 1804; though the evidence showed that the deficiency of the loan officer began in 1791, and continued for several successive years. In December, 1798, the supervisors ordered suits to be commenced on their bonds, against the loan officers, for their deficiencies, but they were not prosecuted, and the loan officers were indulged from time to time, to make good their deficiencies, until the year 1803, when suits were again directed to be prosecuted against them. Henry Jansen, defendant's father, and one of Tappen's sureties, died in 1794. In the year 1798, Tappen was solvent and in good credit, and had the suit against him been prosecuted with usual diligence, to judgment, the whole arrears might have been collected. The Supreme Court of New York held that the foregoing facts constituted a good defense to the action, and the court said: "This case differs essentially from the ordinary case of a security in a bond to a private individual. In such case, the obligee is under no positive injunction or legal obligation to watch over the conduct of his principal debtor, and at stated periods to examine into his accounts, and in case of failure in punctual payment to adopt meas-

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ures calculated to relieve the security. The risk of insolvency of the principal is assumed by the surety, and the liability of the latter continues, unless he should at least require of the creditor to enforce the payment. But the situation of the security in this case is widely different. The statute under which the bond was taken, makes it the duty of the supervisors in each county, together with one or more of the judges of the common pleas, annually to meet and carefully to inspect and examine the minutes and accounts of the loan officers, and if it be found that any loan officer has refused or neglected to perform the duty enjoined upon him, they are directed to elect another in his stead. The security had a right to look to the provisions of this statute, and to calculate his liability on the presumption that the duties enjoined on these public officers would be faithfully and punctually discharged; and, if so, that he could in no event be responsible for more than one year's deficiency. There can be no doubt that the plaintiffs are chargeable with the consequences of the neglect or breach of duty of their agent or public officers intrusted with this business." This case, it will be perceived, carries the doctrine far beyond that held by the Supreme Court of the United States, and while we might not incline to give our assent to the doctrine of that case to its full extent, we cite it in support of the doctrine of the other cases cited, because of the respectability of the court by which the *People v. Jansen* was decided.

In *McCurdy v. Brown & Gibson*, 8 Mo. 550, which was an action against a constable and his securities for the failure of the constable to return an execution, the court held, Scott, J., that "when the security in this case executed the bond by which he is bound, the liability thus incurred was fixed and ascertained by law. Can the Legislature then, by a subsequent act, say that this liability shall be increased? The existence of such a power in the General Assembly cannot be maintained under our form of government." In the case of *Robert Pybus v. Henry Gibb, John*

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*Bolton and Wm. Hindmarsh*, 88 Eng. Com. Law Rep. 902. Lord Campbell, C. J., said: "It may be considered settled law that where there is a bond of suretyship for an officer, and by the act of the parties, or by act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to effect the peril of the sureties, the bond is avoided. Even if the sureties were consenting parties to such a change, it could hardly affect their liability under the bond." Again he said: "There being then such an increase of the jurisdiction of the court as to amount to a change in the nature of the court by giving bankruptcy jurisdiction and jurisdiction over absconding debtors, and the table of fees being altered, I think the office (bailiff of the court) is essentially changed and the sureties no longer liable. It was said that the breach here was one for which the sureties would have been liable if the office had remained unchanged. I think it would be most inconvenient if the sureties were liable for the breach of the original duties of the office and not for those superadded, so as to require discrimination as to duties all of which are performed by the same officer in the same office. But we need not discuss that; for we have the express authority of the House of Lords upon it in *Bonar v. MacDonald*, 3 H. L. Ca. 226. That was an appeal from Scotland, but on this subject the laws of the two countries are essentially the same. It was not the case of an office, but of an employment; fresh duties had, without the consent of the surety, been added to the employment, and then the principal made a default that was within the scope of his original employment; for that default the action was brought; it was argued then as here, that the liability should be the same as before; but the House of Lords, affirming the judgment below, held that after the addition of fresh duties the employment was essentially altered, and the sureties discharged. That is precisely in point. There is no inconvenience; for when an act of Parliament alters the duties of an officer, it will be easy to require him to give fresh sureties, or the

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surety bonds may be framed as suggested by Maule, J., in *Mayor of Berwick v. Oswald*, 3 E. & B. 665, (E. C. L. R., vol. 77,) so as to continue the liability of the sureties, whatever alteration might take place by act of the Legislature. As it is, I think the liability of the sureties on this bond at an end." The other judges, in separate opinions, concurred with the chief justice.

In the following cases it was directly held that the doctrine on this subject, which obtains betwixt individuals, is equally applicable to the State: *Prairie & Jenkins v. Jenkins Pub. Treasurer*, 75 N. C. 546; *Davis et al., v. The People*, 1 Gilman (Ill.) 409. In this case it was expressly decided that where an act of the Legislature gave a collector of taxes a longer time in which to make payment than he had by the law in existence when he executed his official bond with sureties, the sureties were fully discharged if the act was passed without consent. *The People v. McHatton et al.*, 2 Gil. 639, is to the same effect. *Johnson v. Hacker*, 3 Cent. Law Jour. 625, holds the same doctrine, and the opinion of the court, delivered by Nicholson, C. J., is a very able discussion of the subject, and his argument is conclusive. The Virginia case is supported by the *State of Maryland v. Jno. M. Carleton et al.*, 1 Gill 249, but we have found no other, and these cases seem to stand by themselves. Section 97, p. 1179, Wag. Stat., is a recognition of the doctrine that any change or alteration in the law made by the General Assembly after the execution of the bond, would have discharged the sureties before the enactment of that section, which expressly provides that bonds given in pursuance of that act (revenue act) shall not be considered void, nor shall any security be released by any change or alteration in the law made by the General Assembly, although made after the execution of the bond. Our conclusion in this case has not been reached but with great hesitancy, and on account of the public interests involved the question presented has received an unusual degree of attention; but

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reason, and the weight of authority, demand that the judgment of the circuit court be reversed and the cause remanded. All concur.

REVERSED.

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MUSSER, *Appellant*, v. BRINK.

**Partnership:** LANDLORD AND TENANT FEEDING CATTLE ON SHARES. An agreement between landlord and tenant, as a part of the consideration for the lease of a farm, that the landlord shall furnish stock enough to eat the hay, oats and corn raised on the demised premises, the tenant to feed the stock, and, upon sale being made, the landlord to be repaid his purchase money first out of the proceeds, and the remainder to be equally divided between the parties, does not constitute them partners in respect of stock bought and fed under the agreement.

*Appeal from Livingston Circuit Court.*—HON. E. J. BROADDUS, Judge.

C. H. Mansur for appellant.

H. M. Pollard for respondent.

SHERWOOD, C. J.—The petition in this case is as follows: Plaintiff states that on or about the 13th day of March, 1874, he entered into a written contract with the defendant, renting to him, the said defendant, a farm, the property of the plaintiff, situated in the township of Mirabile, in the county of Caldwell, and State of Missouri, from the 1st day of March, 1874, for the term of three years, immediately following the said date last aforesaid; that the defendant thereupon took the immediate possession of said land under said contract; that there was a provision in said contract in words as follows, to-wit: And it is further agreed by and between said parties (referring to plaintiff and defendant) that the party of the first part is to furnish

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money sufficient to purchase stock enough to eat up the said grain or produce raised on said farm, to-wit: The hay, oats and corn, and to not charge interest on any such money, and it is agreed that when any sale of any of said stock is made the party of the first part (referring to the plaintiff) is to first have the amount of the purchase money thereof, and then the balance is to be divided equally between said parties; that pursuant to the provision of said contract last recited, the plaintiff did, on or about the — day of November, 1874, purchase eighty head of two-year old cattle, and did, on or about the day and year last named, deliver the same over to the defendant to feed and care for under the provision of said contract above recited; that defendant, from the date last aforesaid, did feed and take care of said cattle on the said farm of the plaintiff, up to the present time; that by the terms and spirit of said contract the said cattle were to be fed and cared for in the county of Caldwell, aforesaid, and on the said farm above referred to; that defendant now threatens and is about to remove said cattle out of Caldwell county, and to take them to the county of DeKalb, State of Missouri, a distance of about forty miles, contrary to the wish of the plaintiff and to the spirit and terms of said contract, and that by the defendant so taking said cattle out of the county of Caldwell, as aforesaid, the plaintiff will be in great danger of losing said cattle; that if they are so removed he will be prohibited from exercising any control over the same; that he has invested in said cattle the sum of \$2.200; that defendant is wholly insolvent; that the plaintiff has good reason to believe, and does believe, that if the defendant is permitted to remove said cattle, as aforesaid, out of Caldwell county, he, the said defendant, will sell and dispose of the same and appropriate the proceeds thereof to his own use; that plaintiff is wholly without remedy except by this action; plaintiff therefore asks that a writ of injunction issue, restraining and prohibiting the said defendant from removing said cattle from the county of Caldwell, and for



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such other and further orders as the plaintiff may be entitled.

SOLOMON MUSSER.

Which petition is duly sworn to. Upon which petition a restraining order was issued. To which the following answer was filed :

Defendant, for answer to plaintiff's petition, denies that plaintiff, in pursuance of the specification in said contract quoted in said petition, on or about the — day of November, 1874, or at any other time, furnished defendant eighty head of cattle, or any other number whatever, in any way whatever, or that he delivered him said number or any number ; denies that by either the terms or spirit of said contract defendant was to keep the cattle bought by him in pursuance thereof, in said county, or to be fed or cared for there on said farm, further than to feed them the hay, corn and oats grown on said land ; denies that he now threatens, or that he is now about to remove said cattle out of this county, or to take them to DeKalb county, Missouri, contrary to the wish of plaintiff, or otherwise, or that it is against the spirit or letter of said contract to move at this season or the spring season, said cattle out of this county, or that plaintiff would be in great danger, or in any danger, of losing said cattle if they were taken to DeKalb county, Missouri, contrary to the wish of plaintiff or otherwise, or that it is against the spirit or letter of said contract to move, at this season or the spring season, said cattle out of this county, or that plaintiff would be in great danger, or in any danger, of losing said cattle if they were taken to DeKalb county ; denies that he has any right to exercise any control over said cattle, or that he has invested in them one dollar, except as hereinafter stated, or that defendant is insolvent, or that he believes or has any reason to believe, that defendant would sell said cattle and appropriate the proceeds to his own use. Defendant, for further defense to plaintiff's petition, admits the leasing of said farm, but alleges that the plaintiff was

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to and did furnish him \$2,200, for which he gave his receipt, with which money defendant bought said cattle; that at the time of entering into said lease, and the time of purchasing said cattle, it was distinctly agreed and understood by the parties that defendant was to graze said cattle during the spring and summer and autumn, wherever he could get the best and cheapest grazing for them; that there was not sufficient commons in Caldwell county on which he could graze said cattle, and that he owned in DeKalb county 640 acres of excellent pasturage, which was only about twenty miles from said farm, and to which, with the knowledge and consent of plaintiff he was about to move said cattle, when he was enjoined by the writ herein; whereupon he was forced to and did expend \$320 for pasturing said cattle for the season of 1875, when he could have grazed them on his said pasture in DeKalb county entirely free of cost; that he has been forced to expend large sums of money, viz: \$250 in defending said suit, wherefore he prays that said injunction be dissolved, for said sum of \$570 damages, and other proper relief.

Plaintiff filed his reply, one of general denial.

The lease and agreement is as follows:

This deed of lease made and entered into this 13th day of March, 1874, by and between Solomon Musser, of the county of Caldwell, and State of Missouri, party of the first part, and Marion Brink, of said county and State, party of the second part, witnesseth: That the said party of the first part, in considerations of the covenants, agreements and stipulations hereinbefore mentioned, doth, by these presents, demise and lease to the said party of the second part, all those premises situate in said county of Caldwell, and State of Missouri, described as follows, to-wit: The old home farm of said Musser, in sections numbers 20, 21, and number 16, in township 56, of range 29; to have and to hold the above described premises, together with the commons and lands thereto attached and adjoining, belonging to said Musser, and with all the privileges

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and appurtenance to the same belonging unto the said party of the second part, his executors and administrators, dating from the 1st day of March, 1874, for the term of three years next ensuing, and the said party of the second part, in consideration of the leasing of the premises aforesaid by the said party of the first part to the said party of the second part, does covenant and agree with said party of the first part, his executors and administrators, to keep the said farm in good repair, and at the end of his said term, return and deliver the possession thereof to the said party of the first part in as good condition as said party of the second part found it, the ordinary wear and tear excepted, and also keep out of the meadow and pasture all burdock and sourdock, and trim, top and tend the hedge on said farm, and set out and cultivate what will be necessary to keep hedge good; plant, if Musser furnish the plants to him, and tend the orchard, keeping the borers out of the trees. Also, keep the building in as good condition as said party of the second part shall find them, ordinary wear and tear excepted. Also, to work out the road taxes to said Musser charged in respect to and on said premises. Also, to cultivate the grapes and currants, and sprout all that part of the pasture which is or may be cleared out. Also, to mow out the fence corners once a year; said party of the second part to make all rails necessary to keep the fence in repair; said Musser to pay him \$1 per hundred for making the same; said party of the second part to use dead and down timber for firewood; said party of the second part to cultivate and till said farm in a good, husbandlike manner, and to furnish the necessary teams, farming implements and seed of all kinds, except grass seed, for the proper cultivation of said farm, and also, to feed out of the crops raised on said farm all stock hereinafter mentioned. And it is further agreed by and between said parties, that said party of the first part is to furnish money sufficient to purchase stock enough to eat up the

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said grain or produce raised on said farm, to-wit: The hay, oats and corn, and not to charge interest on any such money. And it is agreed that when any sale of any of said stock is made, the said party of the first part is to first have the amount of the purchase money thereof, and then the balance is to be divided equally between said parties. And it is further agreed that if said party of the second part shall furnish any stock to be kept and fed on said farm as aforesaid, he shall in like manner have his purchase money at any sale thereof, and then the balance to be divided equally between them. It is further agreed that all the fruits are to be equally divided, the wheat, apples and potatoes are to be divided in the bushel in equal parts, the said party of the second part to gather and measure the same to said Musser or his agent. Should it be necessary to make any improvements on said premises, said party of the second part is to board the hands; said party of the second part is to furnish his own bread corn; said party of the second part to have the privilege of feeding, out of the produce of said farm, horses sufficient to cultivate the same, and cows enough to supply his family with milk; use of garden allowed to second party free. Musser agrees to release Mrs. Brink from the within contract, if complied with, at the end of any one year in case her husband should die. Said Brink also agrees to release said farm at the end of any one year, provided said Musser sells said farm. Musser also reserves the use of carriage house and the privilege of keeping his colts, two in number, on said farm this summer.

SOLOMON MUSSER.

F. M. BRINK.

Attest: R. J. HOUSE.

This case came on for hearing, when to maintain his issue, plaintiff read in evidence the aforesaid lease. H. C. Timmons, upon part of plaintiff, testified as follows: I know the parties to this suit. Defendant told me in December, 1874, that he could sell the cattle in controversy

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and let the plaintiff whistle for his money; said he could do it, did not say he would do it. He said at the same time he would rather give me every hog he had for nothing than to have plaintiff get one of them. William Medor, on the part of plaintiff, testified: Defendant told me in April, 1875, he had made arrangements to herd the cattle, the subject of this suit, in DeKalb county, Missouri, in the year 1875, just after this suit was brought. Defendant told me that he had the right to sell the cattle, and said he had received them from Musser on the contract between him and Musser to furnish them. A. Smith testified that he knew Brink: told me in June, 1874, that he expected to have a bigger fuss with Musser than the one he had with my father, Governor Smith, the year before over the farm my father leased to him. He told me in June, 1874, that if he was only worth \$1,000 he would quit renting and being a tenant, and buy a little farm for himself. Governor George Smith testified: I know defendant Brink. Brink had personal property probably worth \$800 to \$1,000 outside his household plunder. He owned no real estate. This was in December, 1873. He got \$300 out of me in the spring of 1874. E. J. Moss: I know defendant. Plaintiff, defendant and myself all had a talk on Musser's farm in winter, about early February, 1874. Brink wanted me to herd the eighty head of cattle through the coming summer. He said they could be easily herded and he would give me \$100. I told him if he would deliver them to me in DeKalb county, and give me \$100 I would do it. Mr. Musser said Brink was all right and would do what he promised me. He did not have the cattle at this time, but was about to get them, or was talking with Musser about them or about getting them. I had another talk with him later in the spring alone. He then told me he intended to herd the cattle in DeKalb county, and said he did not think old man Musser would beat him much; that he intended to sell the cattle himself. He did not say at what time he intended to sell them. I did not ask him.

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This was all the testimony given in the case. At this point the court held the parties were partners; and plaintiff could not maintain this suit; and refused to hear further testimony; and refused to permit plaintiff to testify in his own behalf; and peremptorily dismissed plaintiff's petition, and rendered final judgment against plaintiff for costs.

The controlling question in this case is: Does the agreement entered into between plaintiff and defendant, constitute them partners? If it does not, then defendant only has such powers as the instrument confers, and cannot rightfully assume the exercise of those incident to a partnership. In the recent case of *Donnell v. Harshe*, 67 Mo. 170, the subject of partnerships and what constituted them, was examined at some length, as well as numerous authorities referred to, and we there held that an agreement whereby the tenant was to cultivate the farm of his landlord on shares, the landlord and tenant each defraying one moiety of the expenses attendant on such cultivation, and sharing equally in the profits thereof, did not constitute a partnership. The only observable difference between that case and the present one is, that here, with money furnished by plaintiff, cattle were to be purchased to eat the produce raised on the farm. We do not think this case can be distinguished in principle from the one just mentioned, where we cited with approval the case of *Dwinel v. Stone*, 30 Me. 384, wherein it was ruled that a mere participation in profit and loss did not necessarily constitute a partnership, Shepley, C. J., remarking: "There must be such a community of interest as impowers each party to make contracts, incur liabilities, manage the whole business and dispose of the whole property, a right which, upon the dissolution of the partnership by death of one, passes to the survivor, and not to the representatives of the deceased." If we test the case at bar, by the rule thus announced, it is very easy to see that the agreement in question does not evidence a partnership, and this, for the reason that it doe



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not confer on each party power to manage the whole business and dispose of the whole property. This being the case, the property in the cattle remained in plaintiff, and no right to dispose of them was conferred by the contract on defendant, nor to remove them from the farm of plaintiff without his consent. The evidence clearly shows that defendant was intending to take into his own control the sale and disposition of the cattle, and that he was actuated by a spirit which too frequently manifests itself in those who rent farms, and after getting into possession violate every stipulation contained in the lease, and every principle of honesty. For these reasons, we have no question that the injunction should have been granted. We, therefore, reverse the judgment and remand the cause. All concur.

REVERSED.

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PHELPS COUNTY, *Appellant*, v. BISHOP.

1. **Limitation to Action for fraud in issue and sale of County Bonds.** In an action brought by a county to recover money which it had been compelled to pay to an innocent holder of certain negotiable bonds of the county, the petition charged that the defendant, by collusion with the justices of the county court, for the purpose of cheating and defrauding the county, had fraudulently procured the issue of the bonds to himself, and, in consummation of his fraudulent purpose, had afterwards sold and assigned them to the innocent purchaser for a valuable consideration. The issue of the bonds having taken place more than five years before the bringing of the action; *Held*, that the action was not, for that reason, barred by the statute of limitations, that the statute ran, not from the issue, but from the sale and assignment. Until then the fraud was not consummated. In the hands of the defendant the bonds were of no value in consequence of the fraud. The assignment was the crowning act of the scheme to defraud the county.
2. **Pleading Fraud.** The petition in the case examined and held to charge the alleged fraud with sufficient certainty.
3. **County Court orders, Collaterally Assailable for Fraud: BONDS.** An order of the county court allowing a demand against the

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county and directing the issue of bonds in satisfaction of it, is not such a judicial determination as cannot be collaterally assailed for fraud.

*Appeal from Phelps Circuit Court.*—HON. V. B. HILL, Judge.

*L. F. Parker* for appellant.

*C. C. Bland* for respondent.

HENRY, J.—This suit was commenced in the Phelps circuit court in August, 1875. The petition contained three counts. The first alleged that on the 1st day of December, 1868, the defendant presented to the county court of said county a false and fraudulent claim against the county for \$6,000, for alleged failure of the county to convey to defendant fifteen acres of land; that the defendant and each member of the county court, and William C. Kelley, an attorney at law, knew that the claim was false and without foundation, but by collusion betwixt the defendant, W. C. Kelley and the members of said court, the claim was allowed against the county, and a warrant in favor of said Bishop issued for the amount; that on the same day, in furtherance of their corrupt and fraudulent scheme, the county court made an order requiring the clerk of said court to issue to Bishop county bonds to the amount of \$6,000, and take up said warrant, and that, in compliance to said order, the clerk and Wm. Morse, the presiding justice, issued and delivered to Bishop two bonds of Phelps county, for \$500 each, dated 1st day of December, 1868, payable in three years, and five bonds of Phelps county, for \$1,000 each, dated 1st day of December, 1868, payable in five years; all of said bonds bearing ten per cent. interest per annum, payable semi-annually; that afterwards, before the maturity of said bonds, and in consummation of the fraudulent purpose of said confederates to cheat and defraud Phelps county, said bonds were, by Bishop for a valuable consideration, assigned to an innocent purchaser, to whom the county was compelled to pay

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said bonds, with interest, amounting, when paid, to \$9,900; that the claim presented was wholly without foundation.

The second count differs from the first, only in alleging that defendant imposed upon the county court, and procured the warrant and bonds described in the first count.

The third count, omitting to charge Kelley as one of the confederates, contains the same allegations against the members of the county court and defendant as are made in the first count, but is for money had and received.

Defendant filed a general demurrer to the petition, which was sustained by the court, and from the judgment rendered by the court against her, the county has appealed. If either count in the petition is sufficient, the demurrer should have been overruled. That the second and third are defective, we think, does not admit of a doubt. The third, which was for money had and received, certainly could not be maintained, and the only question for consideration is, whether the first count states facts sufficient to constitute a cause of action.

The position of respondent is, that it appears on the face of that count that the action, if ever maintainable,

1. LIMITATION TO  
ACTION FOR FRAUD  
IN ISSUE AND SALE  
OF COUNTY BONDS.

was barred by the statute of limitations; that the fraud as alleged in the petition, was perpetrated on the 1st day of December, 1868, and this suit was not commenced until August, 1875. Until the sale and assignment of the bonds, the fraud was not consummated. In the hands of Bishop they were of no value, in consequence of the fraud with which they were tainted. The county could have avoided them by proof of the fact alleged in the first count. She had no action at law against Bishop until the assignment of the bonds. That was the crowning act of the scheme to defraud the county. She might, before the assignment, have enjoined Bishop from negotiating the bonds, and had them canceled to prevent the consummation of the fraudulent purpose of Bishop and his confederates; but she had sustained no material damage until the bonds were assigned

to an innocent purchaser. It does not appear how long before the maturity of the bonds they were assigned to the innocent purchaser. It does not, therefore, appear that the fraud was consummated five years before the commencement of this action.

It is also urged that the fraud is not charged with sufficient particularity. There may have been particulars in the fraudulent conduct of the defendant and his confederates that are not specifically alleged, but if a sufficiency of fraudulent acts is charged to constitute a cause of action, that is enough. It is said that the petition should have described the fifteen acres which defendant claimed the county was obliged but failed to convey. We do not know, nor could the circuit court assume, that in his demand presented to the county court, the defendant described the land. If it was a false, fraudulent and groundless claim, how could the petition describe the land unless the plaintiff's claim presented to the court described it? There is enough in the petition to apprise the defendant of the charge he is required to answer, sufficient particularity to prevent him from being surprised by any relevant evidence that the county might introduce to sustain the issues on her part.

Nor is there anything in the position that the allowance of the demand and funding the debt was a judicial determination which cannot be thus collaterally assailed. A judgment betwixt the parties to the suit in which it was obtained, is a nullity if obtained by fraud. A direct proceeding to set aside the judgment, when that would afford relief, would be the proper course; but here, it would not have availed the county to set aside the order of the county court after the bonds were negotiated, and it would be a reproach to our law if in such a case as is stated in the first count, the court could give no relief to the injured party.

The first and second counts are inconsistent with each other, but that is no cause for demurrer. Wag. Stat., § 6,

2. PLEADING  
FRAUD.

3. COUNTY COURT  
ORDERS, COLLATERALLY  
ASSAILABLE  
FOR FRAUD: bonds

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The State ex rel. Frost v. Creusbauer.

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p. 1014. There was a misjoinder of actions, but as that objection to the petition was not specified in the demurrer, it may be disregarded. Wag. Stat., § 7, p. 1015. All concurring, the judgment is reversed and the cause remanded.

REVERSED.

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THE STATE *ex rel.* FROST, *Admr. of Deegan*, v. CREUSBAUER  
*et al.*, Appellants.

1. **Administrator's Bond: PLEADING.** A petition which shows that an administrator has failed to comply with an order of payment made by the probate court on final settlement of his accounts, states a good cause of action as against the sureties in his bond, without showing whether the funds were actually lost to the estate before or after the execution of the bond.
2. ———: ———: **EVIDENCE: VOLUNTARY BOND.** In a suit upon an administrator's bond, the only defense pleaded by the sureties was *non est factum*. The evidence offered in their behalf showed that the bond was never approved by the probate court, and that before it was given the administrator had given another bond. *Held*, that this evidence was improperly admitted; 1st, Because it was foreign to the issue; 2nd, Because it constituted no defense. The bond was good as a voluntary bond, though not approved by the probate court, and the party injured had his option to sue upon either of the bonds.
3. ———: **ORDER OF PAYMENT: EFFECT ON ADMINISTRATOR'S SURETIES.** It is well settled that a suit on the administration bond can be maintained against the sureties of an administrator upon an order of payment made by the probate court. The fact that a *sci. fa.* might have been issued against them out of that court after an execution against the administrator had proved barren of results, does not deprive the circuit court of jurisdiction. The order of payment is conclusive against sureties. *Dix v. Morris*, 66 Mo. 514, and other cases.

*Appeal from Phelps Circuit Court.*—HON. V. B. HILL, Judge.

This suit was brought by Frost as administrator of the

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individual estate of Frank Deegan, deceased, upon a bond executed by Creusbauer, as principal, and the other defendants as sureties. Creusbauer and Deegan had been partners in business, and Creusbauer administered upon the partnership estate, and as administrator gave the bond sued on. It appeared from the petition that he was appointed on the 23rd day of September, 1872, and that the bond was given the 2nd day of January, 1873; that there had been a final settlement of the partnership estate, and the probate court had adjudged the sum of \$2,380.44 to be due from Creusbauer to the plaintiff, as administrator, and had ordered him to pay that sum, but he had failed to make payment. Defendants demurred to the petition on the grounds that it showed that the bond sued on was not given until long after the letters of administration were issued, and it did not state whether the same was an original or a new and additional bond; that it did not appear whether the loss or waste to the estate was prior or subsequent to the execution of the bond; that it did appear that a judgment had been entered by the probate court against Creusbauer, but not whether any execution had been issued, or whether any diligence had been used to collect the money and that there was no sufficient assignment of a breach of the bond. The demurrer was overruled, and the sureties filed an answer pleading *non est factum*.

At the trial plaintiff offered evidence of the execution of the bond by defendants, and rested. Defendants then showed that Creusbauer, as surviving partner of the firm of Deegan & Creusbauer, prior to the execution of the bond sued on, gave a bond as administrator of the partnership estate, which was duly approved by the probate court, and on which letters were granted; that afterwards Creusbauer, of his own motion, without any order of the probate court or request of sureties on original bond, procured the defendant sureties to sign the bond sued on, signed it himself and handed it to the clerk of the probate court, who filed it, but never called the attention of the probate court to



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the bond ; that the original bond was in all respects sufficient and the sureties thereon solvent. Defendants then rested. The plaintiff then offered in evidence a record of Creusbauer's final settlement, showing balance due the estate of Deegan, and an order on Creusbauer to pay over said balance to the plaintiff. To this defendants objected, for the reason that plaintiff had rested his case and defendants had also rested, and because the defendant sureties were strangers to the record and settlement, and to the administration. These objections the court overruled and admitted the testimony. Defendants prayed the court to give the following declaration of law, but the court refused: That if a proper bond had been given upon which letters of administration had been granted, in the absence of evidence that the probate court had ordered or approved the bond sued on, it was a voluntary and void bond. There was judgment for the plaintiff and the defendants appealed.

*C. C. Bland* for appellants.

*H. B. Johnson* for respondent.

SHERWOOD, C. J.—Deegan and Creusbauer were partners ; Deegan died, and Creusbauer administered on the partnership estate, being appointed for that purpose September 23rd, 1872. This suit is brought on the relation and to the use of Frost, administrator of the estate of Deegan, on a bond executed by Creusbauer and the other defendants on the 2nd day of January, 1873.

I. It is claimed that the petition was insufficient, but we think it otherwise ; the alleged breach of the bond consisted in the failure of Creusbauer to pay over to Frost, the administrator of Deegan, the amount, \$2,380.44, ascertained by the probate court, on final settlement with Creusbauer, to be due the estate of Deegan, and ordered to be paid. And this was a sufficient assignment of a breach of the conditions of the bond. Those who were sureties on the

bond at the time the alleged breach thereof occurred, were, together with their principal, liable for such default, no matter when those sureties executed the bond, the ground of recovery being the failure to pay the money adjudged on final settlement to be due. The demurrer was, therefore, properly overruled.

II. The sole issue raised by the answer of the sureties, for Creusbauer stood on his demurrer, was whether they executed the bond in suit, and on this point the evidence: voluntary bond. evidence was amply sufficient. As this was the only issue made by the pleadings, any evidence as to a prior bond was wholly foreign to the case and improperly admitted. *Capital Bank v. Armstrong*, 62 Mo. 59; *Chapman v. Cullahan*, 66 Mo. 299. But even had the answer alleged that a prior bond had been given, the fact that this was done, would not invalidate or render void the subsequently executed bond, though no order of the probate court required its execution. This was so ruled in *Wood v. Williams*, 61 Mo. 63. Because a bond is a voluntary one, its binding and obligatory force is by no means lessened. *Henoch v. Chaney*, 61 Mo. 129, and cases cited. And it was optional with the administrator of Deegan's estate whether he should resort to the prior or to the subsequent bond. *Wood v. Williams*, *supra*. And there was no necessity that the latter bond, in order to its validity, should have been approved by the probate court.

III. It is well settled in this State that a suit on the administration bond can be maintained against the sureties of the administrator, who has been ordered to pay over money by the probate court, and that the judgment of that court against the administrator is conclusive against his sureties. *State v. Holt*, 27 Mo. 340; *State v. Rucker*, 59 Mo. 17; *Dix v. Morris* 66 Mo. 514. This disposes of the objection that the circuit court had no jurisdiction over the subject matter of the action. The fact that resort might have been had to the remedy of issuing execution against the ad-

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ministrator, and if this proved barren of results, that *sci. fa.* might have been issued against the sureties under the provisions of Wag. Stat., secs. 13, 14, p. 109, does not deprive the circuit court of its ordinary jurisdiction in this regard.

IV. There is but one point remaining for discussion, and that is in relation to the action of the trial court in permitting plaintiff, after the cause was closed, to introduce further testimony, testimony showing the settlement made in the probate court. We discover no error in this, as it was a matter in the discretion of the trial court. Judgment affirmed. All concur.

AFFIRMED.

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RAITHEL, *Appellant*, v. SMITH.

**Contract to pay Another's Debt.** Defendants bought a pile of bricks, undertaking to pay for them at an agreed rate per thousand; part of the purchase money to go to the vendor, the rest to go in payments on two mortgages then outstanding against the bricks. It turned out that there were not as many bricks in the pile as the parties had estimated. Defendants took what there were, and paid for them at the contract rate, paying the amount due to the vendor and that due on the first mortgage. The holder of the second mortgage not being paid, sued for the amount of his debt. *Held*, that he could not recover; the defendants were not unconditionally liable to plaintiff under their contract.

*Appeal from Greene Circuit Court.*—HON. W. F. GEIGER, Judge.

This was a suit to recover of the defendants \$46, the amount of a note executed by one Bollman in favor of plaintiff. The petition alleged that Bollman, to secure the note, had given plaintiff a second mortgage on 40,000 bricks, and had afterwards sold the bricks to the defendants at \$8 per thousand, with the express understanding

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that defendants should pay plaintiff's note, and that they had failed to pay it. There was judgment for the defendants on the pleadings and proofs, and plaintiff appealed.

*F. S. Heffernan* for appellant.

*C. F. Leavitt* for respondents.

NAPTON, J.—In this case the plaintiff failed to prove the contract alleged in his petition, and this appears from the testimony of his own witness. In May, 1875, Bollman, the witness referred to, sold the defendants a pile of bricks, which he estimated to contain between 40,000 and 50,000 bricks, at \$8 a thousand. He informed the defendants at the time that there were two mortgages on the bricks, one to Owen for \$192, and the other to plaintiff for \$46. It was, therefore, agreed that defendants should pay \$80 to Bollman, and the balance "to go in payments to Owen and plaintiff on the mortgages." It turned out that there were only 34,000 bricks—had there been 40,000, as estimated, the price, at \$8 per thousand, would have paid off both mortgages. As it was, after paying the \$80 to Bollman, which was agreed to be paid in advance, the defendants paid the balance to Owen, who had the first mortgage. And the plaintiff now insists on holding the defendants responsible on the assumption that their contract was unconditionally to pay his mortgage for \$46. No such contract was proved, and the judgment for the defendants was, in our opinion, correct, without regard to the 5th instruction, upon the propriety of which it is unnecessary to express an opinion. Judgment affirmed.

AFFIRMED.

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The State v. Jaques.

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THE STATE *Appellant*, v. JAQUES.

1. **Selling Liquor without License.** An indictment for selling liquor without a license, need not state the name of the person to whom or the place at which the sale was made. *State v. Spain*, 29 Mo. 415, and other cases.
2. ———: **DRUGGIST: CRIMINAL PLEADING.** An indictment under Wag. Stat. of 1872, sec. 2, p. 549, for selling liquor without license, need not negative the existence of those facts which by the act of 1874 (Sess. Acts, p. 46) authorize a druggist to sell without a license. If the defendant was a druggist, and as such, authorized to make the sale for medicinal purposes, that was matter of defense. It is never necessary in an indictment under a statute to negative the exceptions contained in a subsequent statute.

*Appeal from Bollinger Circuit Court.*—HON. J. B. ROBINSON,  
Judge.

This was indictment charging the defendant with having unlawfully and directly sold intoxicating liquors in less quantities than one gallon, to-wit: one pint of whisky, without having taken out a license as a dramshop keeper, and without having any legal authority to make such sale, against the provision of the statute, &c. To this indictment a demurrer was interposed, alleging as grounds of objection that it was founded on section 1, page 46, Acts 1874, and did not negative the fact that the liquor was sold for medicinal purposes upon the written prescription or certificate of a regular, practicing physician, and that it did not give the name of the person to whom it was sold, nor state the place where it was sold. The demurrer was sustained and judgment was rendered for the defendant, from which the State appealed.

*J. L. Smith*, Attorney-General, and *J. H. Willson* for the State.

*Madison R. Smith* for respondent.

HENRY, J.—The objections to the indictment, that it

does not allege to whom or at what place the liquor was sold, are met by the cases of the *State v. Spain*, 1. SELLING LIQUOR WITHOUT LICENSE. 29 Mo. 415; *State v. Ladd*, 15 Mo. 432; *State v. Fanning*, 38 Mo. 359; *State v. Melton*, 38 Mo. 369, in which it was held that those allegations are not indispensable to a good indictment. The *State v. Neales*, 10 Mo. 500, and *Austin v. The State*, 10 Mo. 591, to the contrary, have long since been overruled.

The only remaining question is, whether the indictment is defective in failing to negative the existence of those facts, which, by the act of March 26th, 1874, authorized a druggist to sell intoxicating liquors in less quantities than one gallon. The second section of the General Statutes, (Wag. Stat., § 2, p. 549,) in relation to dramshops, prohibits every person from selling intoxicating liquors in any quantity less than one gallon, without taking out a license as a dramshop keeper. The act of 1874 makes exceptions to the general law. The indictment is drawn under the second section of the act in relation to dramshops, and not under the act of 1874. How was the court to know that defendant was a druggist? He was not indicted as such, and if he sold the liquor as a druggist, under circumstances which authorized the sale, that was a matter of defense. It was expressly averred that he had not taken out a license as a dramshop keeper, and had no legal authority whatever to sell. This has been repeatedly held a sufficient negation of any special or general authority to sell, other than that expressly negated. *Austin v. The State*, 10 Mo. 591; *State v. McBride*, 64 Mo. 365, and cases *supra*. The exceptions or provisos contained in the same act need not be negated, unless named in the section creating the offense. *State v. O'Gorman*, ante, p. 179, and authorities there cited. The same doctrine applies where the exceptions are contained in a subsequent act. There is no foundation for the position that the second section of the act in relation to dramshops was repealed by the act of 1874. The demur-



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rer to the indictment should have been overruled, and the judgment is reversed and the cause remanded. All concur.

REVERSED.

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STERN *et al.*, Appellants, v. HENLEY.

**Fraudulent Conveyances:** CHANGE OF POSSESSION. A merchant tailor having sold his stock of goods to a journeyman employed in his shop, absented himself from the county for a few days, during which time the goods were attached as his property. The purchaser was left in possession, but no notice was given of the sale, and no one knew of it but the parties and the attorney who drew the bill of sale. The same sign remained up over the door of the shop, and the same business advertisement was continued in the local paper. *Held*, that there was no such open, visible and unequivocal change of possession as would apprise the community, or those accustomed to deal with the vendor, that the goods had changed hands, and that the sale was, therefore, void under the statute relating to fraudulent conveyances. (Following *Wright v. McCormick*, 67 Mo. 426, and other cases.)

*Appeal from Jasper Court of Common Pleas.*—HON. E. D. BROWN, Judge.

*Waters & Winslow* and *L. P. Cunningham* for appellants.

*W. H. Phelps* for respondents.

HOUGH, J.—This was a suit by attachment, brought against the defendant P. W. Henley, on the 15th day of December, 1875, for goods sold and delivered by the plaintiffs to said defendant. The defendant Thomas Henley, filed an interplea claiming the goods seized under the attachment by virtue of a purchase thereof from P. W. Henley, the defendant, on the 3rd day of December, 1875. A verdict was rendered in favor of the interpleader, and

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judgment entered thereon, from which plaintiffs have appealed. P. W. Henley was a merchant tailor, doing business in the town of Carthage, and Thomas Henley, who was his brother, worked in his shop as a journeyman tailor. From the day of the sale to his brother, to the day of the attachment, the defendant P. W. Henley, was absent in an adjoining county; but there was no such open, visible and unequivocal change of possession as would apprise the community, or those accustomed to deal with P. W. Henley, that the goods had changed hands, and that the title had passed from him to his brother, Thomas Henley. Neither the owner of the building in which the defendant did business, nor any one else, save the attorney under whose direction the sale was conducted, was notified thereof. The same sign, "P. W. Henley, Merchant Tailor," remained up, and his advertisement as merchant tailor was continued in the local paper, unchanged. These facts are undisputed. Thomas Henley, himself, testified to them. The trial court should have declared, as a matter of law, that there was no such actual change of the possession of the goods sold, as is required by the statute relating to fraudulent conveyances. *Clafin v. Rosenberg*, 42 Mo. 439; *Lesem v. Herriord*, 44 Mo. 323; *Bishop v. O'Connell*, 56 Mo. 158; *Wright v. McCormick*, 67 Mo. 426. There was no testimony to support the verdict, and the judgment will be reversed and the cause remanded. All concur.

REVERSED.

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The State v. Agee.

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THE STATE V. AGEE, *Appellant*.

1. **Arraignment.** Judgment reversed because the record fails to show that the prisoner was arraigned.
2. **Attempt to Shoot.** To constitute an offense under Wag. Stat., sec. 33, p. 450, it is not necessary that the person whose life is endangered by defendant's act, shall actually be injured. It is as much an offense under that section to shoot at a man and miss him, as to shoot at him and hit him.

*Appeal from Carroll Circuit Court.*—HON. E. J. BROADBUSH, Judge.

This is an indictment charging the defendant with shooting at one George Gartin, in a case and under circumstances which would have constituted manslaughter if death had ensued. Defendant was convicted and appealed to this court.

*Hale & Eads* for appellant.

*J. L. Smith*, Attorney-General, for the State.

SHERWOOD, C. J.—I. As the record shows no arraignment of defendant, this, under repeated adjudications, must accomplish the reversal of the judgment.

II. But notwithstanding that the judgment must be reversed, it is necessary that we decide the main point which induced this appeal. It is insisted that as the testimony does not show that Gartin was wounded or anywise injured by the pistol shot fired at him by defendant, that, therefore, the conviction could not stand, even had the defendant been duly arraigned. The indictment is framed under 1 Wag. Stat., sec. 33, p. 450. That section is as follows: "If any person shall be maimed, wounded or disfigured, or receive great bodily harm, or his life be endangered by the act, procurement or culpable negligence of another, in cases and under circumstances which would constitute murder or manslaughter, if death had ensued,

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the person by whose act, procurement or negligence such injury or damage of life shall be occasioned, shall, in cases not otherwise provided for, be punished by imprisonment in the penitentiary or county jail," &c. We have frequently held that an indictment based on the section referred to need not state that the act was done willfully, intentionally, with malice, with a deadly or dangerous weapon, or under circumstances which had death ensued, would have constituted murder or manslaughter. *State v. Moore*, 65 Mo. 606, and cases cited. The indictment, however, in the present instance, follows the language of the statute, and is very full, charging that the defendant, "by the said act, assault and shooting, feloniously did endanger the life of the said George H. Gartin, in a case and under circumstances which would have constituted manslaughter, and made the said Francis M. Agee guilty of manslaughter had the death of the said George H. Gartin ensued and resulted from the aforesaid assault and shooting." We hold it quite too plain for argument that it is as much of an offense under section 33, *supra*, to shoot at a man and miss him, as it is to shoot at him and hit him. Otherwise, the language of that section, "*or his life be endangered by the act,*" &c., is absolutely meaningless, since the first part of that section had already provided for cases where injury had resulted in consequence of the unlawful act. Judgment reversed and cause remanded. All concur.

REVERSED.

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The State v. Meyers.

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THE STATE V. MEYERS, *Appellant*.

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1. **Eleven Jurors.** It is a fatal defect in the record if it shows that only eleven jurors were present when the verdict was received by the court.
2. **Embezzlement.** An indictment for embezzlement described the property embezzled as "certain United States five-twenty government bonds, which were valuable securities, of the value of \$5,000." *Held*, a sufficiently particular description.
3. —: **AGENCY.** An indictment for embezzlement charged that defendant was the agent of the person whose property was embezzled, and that he received it as agent. *Held*, sufficient. It is not necessary to set out in detail the nature and purposes of the agency. The proof, however, must establish an agency within the meaning of Wag. Stat., sec. 35, p. 458, and not an ordinary bailment.
4. **Pleading, Criminal: LIMITATIONS.** When the fact is that the offense for which an indictment is found was not committed within the time fixed by the statute of limitations as a bar, the better practice is to allege the true time in the indictment, and then set forth the facts which avoid the bar of the statute. But see *State v. English*, 2 Mo. 182.

*Appeal from Newton Circuit Court.*—HON. JOSEPH CRAVENS,  
Judge.

*Bray & Cravens* for appellant.

*J. L. Smith*, Attorney-General, for the State.

HOUGH, J.—In 1876 the defendant was indicted in the Jasper circuit court under the 35th section of article 2, 1. **ELEVEN JURORS.** chapter 42, Wag. Stat., for embezzling certain United States bonds, charged to have been received by him as agent of one Zumbro. On the application of the defendant a change of venue was awarded to Newton county, and at the February term, 1878, of the circuit court of that county, he was tried and convicted. It appears from the record that only eleven jurors were present when the verdict of the jury was received by the court. This is a fatal defect, and the judgment must, therefore, be reversed. *State v. Mansfield*, 41 Mo. 470.

It may be that all the jurors were really present, and

that the defect in the transcript is the result of a clerical mistake, and we incline to this opinion from the fact that several important omissions have evidently occurred in transcribing the indictment into the record. We are bound, however, to accept the transcript before us as complete and accurate. The loose and reckless manner in which records are frequently prepared for this court in criminal cases, particularly, is inexcusable. Want of attention and accuracy in this matter tends to defeat the enforcement of the criminal laws and to largely increase the criminal costs to be paid by the State, and devolves upon the attorney-general the labor which cannot always be reasonably performed, of verifying all the records in criminal cases which are brought to this court. Clerks and prosecuting attorneys should give their attention to this matter.

As the case must be retried, we will dispose of several points made by the defendant. It has been argued here <sup>2</sup>, **EMBEZZLEMENT**. that the indictment is defective in that it does not sufficiently describe the bonds alleged to have been embezzled, and does not set forth the nature and purpose of the agency. The bonds were described as certain United States five-twenty Government bonds, which were valuable securities of the value of \$5,000. A more particular description than this is not now required. Wag. Stat., §§ 28, 30, p. 1091.

Nor do we think it was necessary to set out in detail the nature and purpose of the agency. The agency of the <sup>3</sup> —: agency. defendant, and the receipt of the bonds by him in his capacity as agent, are distinctly averred. The character in which he acted is not left to be inferred from facts stated, but is definitely fixed by direct averment, and must be proved as laid. The contract between the defendant and Zumbro, the owner of the bonds, need not be set out, but the contract, when proven, must establish an agency within the meaning of the section of the statute under which he was indicted, and not an ordinary bailment.



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It appears from the record that the indictment was found more than three years after the commission of the offense charged. The indictment alleged that the offense was committed within three years. The better practice in such cases is to allege the true time of the commission of the offense charged, and set forth the facts which avoid the bar of the statute of limitations as an excuse for not having preferred the indictment sooner; though it has been held that the offense may be alleged to have been committed within the time fixed by the statute, and that the facts which suspend the running of the statute may be proved at the trial. *State v. English*, 2 Mo. 182. For the error heretofore indicated, the judgment will be reversed and the cause remanded. All concur.

REVERSED.

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DUNN V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY,  
*Appellant.*

1. **Railroad:** TRANSPORTATION OF LIVE STOCK: CONNECTING ROADS: NEGLIGENCE. In an action against a railroad company to recover damages for negligence in the transportation of live stock, it appeared that the defendant company had undertaken to carry the stock to a point on a connecting road beyond its own line; that owing to the departure of the train on the connecting road before defendant's train arrived at the junction, they were detained there about twenty-four hours in severe winter weather, without food or water, in consequence of which they were greatly damaged; that they finally reached their destination without further delay; that the chief, if not the only injury sustained on the entire route was that caused by the detention, and that the stock was carried under a contract which exempted the defendant from liability for injuries occurring on connecting roads. Evidence having been admitted by the trial court, 1st, to show that when defendant's train was about to start plaintiff requested defendant's agent to telegraph to the agent of the connecting line that the stock was coming, but he failed to comply with

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the request, and that it was usual to give such notice, and on receipt of it the trains of the connecting company were accustomed to await the arrival of defendant's trains; 2nd, to show the condition of the stock when they arrived at their destination, their value in that condition, and what they would have been worth if sound; *Held*, that it was all properly admitted, the first as bearing upon the question of negligence; the second, as furnishing data from which the jury could arrive at the damage resulting from the detention, but not for the purpose of charging the defendant with any that might have occurred on the connecting road.

2. — : — : INTEREST ON DAMAGES. In such an action interest may be allowed on the amount of damages sustained, to be computed from the institution of the suit.
3. — : TRANSPORTATION OF LIVE STOCK : CONNECTING ROAD. It is the duty of a railroad company receiving live stock for transportation to have proper machinery and facilities for unloading them whenever, in the course of the transit, it may become necessary to unload them for the purpose of feeding
4. — : — : — . Where a railroad company undertook to transport live stock to a point beyond its own line, and on the line of a connecting company, and upon arrival of the train at the junction it was found that the stock could not be forwarded immediately, and that, to prevent damage, it should be unloaded, fed and watered; *Held*, that it became the duty of the first company to see that this was done; and that duty could not be imposed on the owner; and this, although he was accompanying the stock under a contract which provided that he should take care of, water and feed them while under transportation.
5. **PRACTICE: DEFECT OF PARTIES.** The objection of defect of parties can be raised only by demurrer or answer, not by instructions to the jury.
6. **Contract of Affreightment: DAMAGES.** A contract of affreightment contained this provision: "Claims for loss and damages must be presented in thirty days from date of shipment in order to receive attention." *Held*, that failure to present within thirty days did not cut off a claimant's cause of action. The language employed is too vague to be allowed that effect. Distinguishing *Rice v. Kansas Pacific R. R.*, 63 Mo. 314.

*Appeal from Shelby Circuit Court.*—HON. JOHN T. REDD,  
Judge.

The following are the instructions referred to in the

opinion of the court, as having been given by the court below on its own motion :

1. The court instructs the jury that under the contract sued on the defendant was bound to transport the mules from the town of Shelbina to the station at the city of St. Louis, and to deliver said mules to the plaintiff at said station; that by said contract plaintiff undertook to feed, water and take care of said mules during their transit, and that under said contract it was the duty of defendant to provide all the necessary means for transporting said mules with a reasonable degree of safety, and to provide plaintiff with such facilities to water, feed and take care of the mules as under the circumstances were reasonably requisite for that purpose; and if the jury find from the evidence that the mules were detained at Macon City on their way to St. Louis for want of means of transportation, and that the circumstances accompanying such detention were such as to make it necessary to avoid injury to the mules, that they should be removed from the cars, watered and fed; and if the jury further find that defendant, or its agents and employees neglected and failed to furnish the usual and customary facilities for that purpose; and if the jury further find that in consequence of such negligence and failure plaintiff's mules were injured, the jury ought to find the issue for plaintiff, and assess his damages at the actual amount of injury or damage sustained by plaintiff caused by such negligence, with interest thereon at the rate of six per cent. from the institution of this suit to the present time.

2. The court instructs the jury that although the jury may believe from the evidence that the mules were injured in value by reason of the fact that they were confined in defendant's cars at Macon City from the time of their arrival at said point until they were started from said point to St. Louis, and by reason of the condition of the weather during said period of time, and want of water and food, yet unless the jury further find from the evidence that

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such injury was caused by the failure of defendant, or its agents or employees, to use a reasonable degree of care to prevent such injury, they ought to find for the defendant.

3. That upon the issue as made by the pleadings in this cause, the defendant is not liable for any injury to the mules occurring after said mules left Macon City, if they sustained any such injury.

4. The defendant is not liable in this action for any injury that the mules, in consequence of any vicious propensities, may have inflicted on each other, unless such vicious propensities were excited by the negligence or want of proper care on the part of the defendant, or its employees, nor is defendant liable for any injury to said mules arising from the want of water or food, provided defendant, its agents or employees, used reasonable care to provide plaintiff with such facilities as may have been necessary to enable him to water and feed the mules.

The following are among the ten instructions referred to in the opinion of the court as having been offered by the defendant and refused by the court below :

1. Under the pleadings and evidence the plaintiff is not entitled to recover.

2. The contract read in evidence does not require the defendant, or any of its agents, to notify the connecting carrier of the fact that the defendant has live stock for transportation and delivery to such connecting carrier, and a failure to do so on its part is neither a breach of said contract nor of defendant's duty as a common carrier of live stock.

3. Under the contract read in evidence the defendant only undertook and agreed to carry the mules sued for, promptly and safely, and within a reasonable time, from Shelbyna to the next connecting carrier on the line of its road to St. Louis, and there to safely, and within a reasonable time, deliver said mules to said carrier; and that the plaintiff should not be charged more than \$58 per car for carrying said mules from Shelbyna to St. Louis. If the

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jury believe from the evidence that the defendant, promptly and safely, and within a reasonable time after said mules were delivered to it at Shelbina, carried said mules from Shelbina to Macon City, and there delivered said mules to the St. Louis, Kansas City & Northern Railway Company, in good order and condition, within a reasonable time after the arrival of said mules at Macon City; that said St. Louis, Kansas City & Northern Railway Company was the next connecting carrier between the defendant's road at Macon City and St. Louis, then such carrying and delivery, and the payment of not exceeding \$58 per car, is a full performance of the contract read in evidence, and they will find for defendant. And in this case there is no evidence that the plaintiff paid more than \$58 per car for carrying said mules from Shelbina to St. Louis.

4. If the jury believe from the evidence that the defendant carried the mules sued for from Shelbina to Macon City, promptly and safely, and on time; that it delivered said mules to the St. Louis, Kansas City & Northern Railway Company at Macon City; that said St. Louis, Kansas City & Northern Railway Company received and shipped said mules on the first freight train on its road leaving Macon City for St. Louis; that said St. Louis, Kansas City & Northern Railway Company was the next connecting carrier between the defendant's railroad at Macon City and St. Louis, they will find for defendant; notwithstanding they may further believe from the evidence that said mules remained in the cars in which they were shipped from Shelbina to Macon City, twenty-two hours, awaiting the arrival of the train on the St. Louis, Kansas City & Northern Railway, in which they were shipped from Macon City to St. Louis, provided they shall further believe from the evidence that the plaintiff failed to notify defendant's conductor of the train which carried said mules, agent or yardmaster at Macon City, on the arrival of said mules, that he wanted said mules switched up to the chute at Macon City so that he could unload them, until after the engine pull-

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ing the train in which said mules were carried had left Macon City, and there was no other engine at Macon City with which defendant could have switched up said mules to said chute.

5. If the jury believe from the evidence that the plaintiff could have got the mules sued for unloaded at Macon City by the first freight train bound from Macon City to Moberly on the St. Louis, Kansas City & Northern Railway after the arrival of said mules at Macon City, and fed, watered and rested, and thereby have saved himself from all the damage which ensued to said mules after the arrival of said train at Macon City, by reason of their not being unloaded, fed, watered and rested, then it was the duty of the plaintiff to have unloaded, fed, watered and rested said mules, and in assessing the plaintiff's damages they will exclude all of said damages from their assessment.

6. If the jury believe from the evidence that James Dunn was a partner of the plaintiff in the mules sued for, then plaintiff is not entitled to recover in his name alone, and they will find for the defendant.

*Geo. W. Easley* for appellant.

*Edwin Silver, Lay & Belch and Dunn, Anderson & Boulware* for respondent.

NORTON, J.—This suit was instituted in the circuit court of Shelby county for the recovery of damages alleged to have been sustained on a shipment of forty mules in the cars of defendant.

The petition alleges that on the 20th day of January, 1873, plaintiff delivered to defendant at Shelbina, a station on her road, forty head of mules of the value of \$5,000, to be shipped to St. Louis; that said mules were received, and defendant, in consideration of the sum of \$116, to be paid by plaintiff, undertook to exercise and observe due and proper care in the carriage of said mules as a common



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carrier for hire, except so far as its duty as such was limited by the terms of a written contract entered into at the time the mules were delivered, which said agreement provided among other things, that the defendant should not be liable for any damages said property might sustain, except such as might occur by the negligence or misconduct of defendant, and that plaintiff should take care of, water and feed said stock while under transportation. It is further alleged that the train of defendant conveying said mules arrived at Macon City about seven o'clock in the evening of the day they were received, where they were to be turned over to the St. Louis, Kansas City & Northern Railway for further transportation to their destination; that plaintiff was on the train for the purpose of feeding, watering and taking care of his stock, and immediately after the arrival of said train at Macon City he learned that said mules would be retained a great length of time awaiting a train on said St. Louis, Kansas City & Northern Railway, and thereupon demanded of defendant's servants that the cars containing his mules should be placed on the track at the stock pens so that he might unload, feed and water them; that to do this defendant wholly failed, but left the said cars on a spur track a great distance from the stock pens with three intervening tracks between it and the stock pens, that the mules could not be unloaded from the cars where they were left by defendant, and that they could neither be fed nor watered without being unloaded; that in consequence of the neglect of defendant they were compelled to stand in said cars, in extremely cold weather, for about twenty-four hours without water or food, whereby they were injured and damaged in the sum of \$2,000.

The answer denies all the allegations of the petition, except the receipt of the mules for transportation and the agreement relating to their shipment, and alleges that under the terms of the agreement plaintiff was to take care of and feed the stock, and to assume all risk of injury or amage that the animals might do themselves or to each

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other, or which might arise from delay of trains, and that defendant should not be held responsible for any loss or damage which might occur after said stock was delivered at the point on its line to which, by the contract, it was consigned, or for any loss or damage after said mules were turned over to another railroad company for further transportation. The answer alleges that on the arrival of the train at Macon City the stock was promptly delivered to the St. Louis, Kansas City & Northern Railway for transportation to St. Louis, and that by the terms of the contract plaintiff agreed that if he sustained loss or damage he would present the same within thirty days from date of shipment for adjustment, and that to present such claim plaintiff has wholly failed and neglected. The replication is a denial of the answer. Upon a trial of the cause plaintiff obtained judgment for \$850, from which defendant has appealed, and assigns for error that the court admitted improper and illegal evidence, refused proper and gave improper instructions.

After the contract of shipment was read in evidence, which was substantially as set out in the petition and an-

1. RAILROADS: swer, the plaintiff was offered as a witness, transportation of live stock: con- and during his examination was asked: necting loads: negligence.

"Did you request the agent of defendant at Shelbina to telegraph to the agent of the St. Louis, Kansas City & Northern Railway that you would arrive that evening with two car loads of mules for St. Louis, and to be ready to ship them?" The witness was permitted to answer the question over the objection of defendant, who insisted in the court below, as she does here, that it was irrelevant, that the petition contained no allegation of negligence in this respect, and that defendant, under the contract, was under no legal obligation to telegraph as requested. We think the evidence was pertinent to the issue. The issue was whether the mules were injured by the negligence or misconduct of defendant, and although the special contract had the effect of limiting defendant's

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liability as a carrier, and of exempting from liability for injuries incurred from delay of trains and other causes mentioned therein, yet if such delay was occasioned by the negligence of defendant, either in doing properly or omitting to do that which was reasonably required to be done touching the business in hand, the defendant is liable for injuries resulting therefrom. ) *Read v. St. L., K. C. & N. Ry.*, 60 Mo. 199; *Levering v. U. T. & I. Co.*, 42 Mo. 88; *Wolf v. Am. Ex. Co.*, 43 Mo. 421; *Ketchum v. Am. Mer. Un. Ex. Co.*, 52 Mo. 390.

The mules in question were to be transported from Shelbina to St. Louis, and were to be turned over at Macon City, a point on defendant's line of road, to the St. Louis, Kansas City & Northern Railway for further transportation to their destination. In view of the fact that such transfer was to be made, and the stipulation contained in the contract (aside from defendant's duty as a common carrier) that "due diligence would be used in sending the stock forward," it was the duty of defendant's agent, when requested, to telegraph to the agent of the connecting line at Macon City the expected arrival of the stock so as to avoid delay at the latter point. We think the evidence was properly received, especially as it was shown by the agent of the St. Louis, Kansas City & Northern Railway, at Macon City, that it was customary for the agent of defendant at Shelbina to telegraph the agent of the St. Louis, Kansas City & Northern Railway when they had freight to be run over said road to St. Louis, and that in such case it was usual to delay the trains of the latter company till the arrival of defendant's train.

The action of the court in allowing a witness to state, over the objection of defendant, the condition of the mules when taken off the cars on their arrival in St. Louis, their value in the condition they were in, and also their value if in a sound condition, it is claimed was erroneous. We perceive no valid reason why this evidence should not have been received, for the evidence which had been introduced

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tended to show that the chief, if not the only injury sustained by the mules was in consequence of the fact that they had been left standing in the cars at Macon City in cold, sleeting weather, for about twenty-four hours without water or food; (that they could not be unloaded, fed or watered because the cars containing them were left on a spur track two hundred feet from the chute of stock pens, that in consequence thereof, they were in a suffering condition, with their limbs much swollen and stiffened; that they went through from Macon City to St. Louis on time, and that such stock would sustain more injury by standing one hour in cars at rest in cold weather, than by standing twelve hours in cars while in motion or running.) If the purpose of the evidence was to hold defendant answerable for any damage which occurred after the mules left Macon City in charge of the St. Louis, Kansas City & Northern Railway, it would have been inadmissible, but regarding it in connection with the other evidence as simply furnishing data from which the jury could arrive at the damage sustained while the mules were detained without being watered or fed at Macon City, we think it was properly received. *Sturgeon v. St. L., K. C. & N. Ry. Co.*, 65 Mo. 573.

The court refused ten instructions asked by the defendant, and gave of its own motion four, to which action exception was taken. The instructions given by the court contain a fair exposition of the law as applicable to the facts of the case, and it has been held by this court that in such case the judgment will not be reversed because of the refusal of the court to give other instructions unexceptionable. It is objected that the first instruction makes defendant responsible for injuries occurring beyond its line. We do not think it is subject to this objection. It is true that it tells the jury that under the contract defendant was bound to transport the mules from Shelbina to the city of St. Louis, and to deliver them at that place, but in the estimation of damages they were confined to such damages as occurred

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while they were detained at Macon City, and they were expressly told in the third instruction that defendant was not liable for any injury occurring after the mules left Macon City. The contract read in evidence bound defendant to transport the mules to St. Louis, with a limitation against liability for damages occurring in the course of transportation by any connecting line to which they might be turned over for further transportation.

The objection that the instruction authorized the jury to allow interest is answered by the case of *Gray v. Missouri River Packet Co.*, 64 Mo. 50. We, therefore, think the first instruction was properly given and the third asked by the defendant properly refused.

The fourth instruction which was refused, puts the inability of plaintiff to recover on his failure to notify de-

fendant at Macon City to have the cars containing the mules switched up to the chute of the stock pens, till after the engine pulling the train of cars had left Macon City. This instruction was properly refused because it ignores the duty of defendant to have proper machinery and facilities for unloading stock to be fed when in course of transit it may become necessary to do so, and because it assumes, as a matter of law, that the engine of defendant which pulled the train to Macon City remained a reasonable time after the plaintiff obtained information that the train of the St. Louis, Kansas City & Northern Railway had gone, which fact gave rise to the necessity for unloading the stock.) After the ascertainment of this fact plaintiff certainly was entitled to a reasonable time within which to make the demand, and we think, under the evidence, the court could not assume, as it was asked in effect to do, that the engine of defendant remained at Macon City such reasonable length of time. The evidence shows that the train of defendant arrived at Macon City after night; that it was storming and cold and sleeting, that plaintiff left the train immediately on its arrival to ascertain about the train of

2. — : — :  
interest on damages.

3. — : trans-  
portation of live  
stock: connecting  
road.



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the connecting line, and, learning that it had gone, demanded of the agent of defendant to have his mules sent over to the chute of the stock pens. The conductor of the train testified that the engine remained but fifteen or twenty minutes at Macon City. Under these circumstances the question as to whether the train remained a reasonable length of time should have been referred to the jury.

The fifth instruction was properly refused, because it imposed a duty on plaintiff which devolved on defendant.

4. —: —: *Railway v. McCarthy*, 6 Otto 258; *Blackwell v. Fosten*, 1 Met. (Ky.) 95.

The sixth instruction was properly refused under the authority of *Reugger v. Lindenberger*, 53 Mo. 365, and Wag. Stat., § 10, p. 1015.

On the margin of the contract read in evidence the following words occur: "Claim for loss and damages

5. PRACTICE: de- must be presented within thirty days from  
fect of parties. 365, and Wag. Stat., § 10, p. 1015.  
6. CONTRACT OF AF-  
FREIGHTMENT:  
damages.

date of shipment in order to receive attention." It is contended by appellant that there was no evidence of the presentation of any claim for damages within thirty days, that the first instruction of defendant should have been given. In the case of *Rice v. K. P. Ry. Co.*, 63 Mo. 314, we upheld a stipulation contained in the body of the contract that no claim for damages should be allowed unless demand was made in writing. The stipulation in that case (as observed in the case of *Oxly v. St. L., K. C. & N. Ry.*, 65 Mo. 629) is distinguishable from such stipulations as the one in this case. There it was expressly agreed that no damages should be allowed unless after demand made. Here the words are vague and uncertain as to what result should follow from a failure to present the claim. If it were intended that no right of action should exist after such failure, and no liability rest upon defendant, it should have been so expressed in the contract, and not left to inference. Whatever was intended by the words employed, we cannot construe them so as to deprive the



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Battle v. Crawford.

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plaintiff of a right of action. Such intention is not expressed, and a stipulation, to have that effect, ought to be clear and certain, and incorporated in the contract as one of its terms and conditions. Judgment affirmed with the concurrence of SHERWOOD, C. J., and NAPTON, J. HENRY and HOUGH, JJ., dissenting.

AFFIRMED.

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BATTLE V. CRAWFORD, *Appellant*.

**When Statute of Limitation Commences to Run Fraudulent Concealment does not Interrupt it.** In June, 1864, plaintiff left with defendant a sum of money as a special deposit. On July 20th, 1864, he demanded the money of defendant, who refused to deliver it to him. On September 1st, 1871, he brought suit, to which defendant interposed the statute of limitations of five years. Plaintiff, in reply alleged, as an excuse, a fraudulent concealment of defendant as to what had become of the money; *Held*, that the statutory bar was complete, as the statute commenced to run from the date of the demand and refusal.

*Appeal from Livingston Circuit Court.*—HON. E. J. BROADBUSH, Judge.

*Crosby Johnson and Shanklin, Lowe & McDougal* for appellant.

Respondent not represented by counsel.

HENRY, J.—This was an action for the conversion by defendant of a sum of money alleged to have been left with him by the plaintiff as a special deposit.

It is not an action *ex contractu* but *ex delicto*. Among other defenses, the appellant relied upon the statute of limitations, and if the cause of action accrued more than

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Battle v. Crawford.

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five years before the commencement of this suit, it was barred by the statute. Wag. Stat., § 10, p. 918.

The suit was instituted September 1st, 1871. Plaintiff's evidence was to the effect that he made the deposit in June, 1864. He testified that on the 20th day of July, 1864, he demanded of defendant the package containing the money, and that he refused to deliver it to him. Defendant denied that any such deposit or demand was made. The court refused the following instruction asked by defendant: If the jury believe from the evidence that before the raid upon defendant's safe, in proof, plaintiff demanded the money in controversy of defendant, and that defendant after such demand and before the safe was robbed, declined to deliver such money to the plaintiff, the jury must find for the defendant. The evidence proved that the raid and robbery of the safe occurred the 20th day of July, 1864, and that instruction should have been given. Plaintiff alleges, as a reason and excuse for not having commenced his suit earlier, that defendant told him that his safe had been robbed by the bushwhackers, and the package containing his money taken off by them, and that he relied upon defendant's said statements, which he did not, until the beginning of the year 1870, ascertain, as he then did, were falsely and fraudulently made by the defendant. Whether the case thus stated is within Wag. Stat., sec. 24, p. 920, it is not necessary to determine. If the plaintiff demanded of defendant his money on the 20th day of July, 1864, and defendant refused to deliver it to him, he then had a complete cause of action. The statute then commenced running, and the false and fraudulent representations made by the defendant did not prevent the plaintiff from suing on that cause of action or the statute from continuing to run against it. If a demand was made for the package by the plaintiff and defendant refused to deliver it to him, the fact that afterwards his safe was broken open and the package stolen would have constituted no

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 Ensworth v. Curd.
 

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defense whatever to an action by the depositor to recover his money. The judgment of the circuit court is reversed and the cause remanded. All concur.

REVERSED.

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ENSWORTH, *Appellant*, v. CURD, *Admr.*

1. **Jurisdiction of Probate Court:** PARTNERSHIP: SETTLEMENT. The final settlement of a partnership, on the death of a co-partner must, under the administration laws of this State, be made in the probate court. Until final settlement, the circuit court has no jurisdiction.
2. **Constitutionality of act.** The act establishing the probate court of Buchanan county is constitutional. *State v. Geiger*, 65 Mo. 306.
3. **Constitutional Law:** LEGISLATURE. Under the constitution of 1865, the question whether a general law could be made applicable to a given case was one addressed to the discretion of the legislature.
4. ———: STATUTE PARTLY VOID. That a statute authorized a judge to appoint a clerk, in violation of a provision of the constitution, would not invalidate other portions of the act.
5. **Costs.** A court, dismissing a case for want of jurisdiction, has authority to render a judgment for costs.

*Appeal from Buchanan Circuit Court.*—HON. J. P. GRUBB, Judge.

*Vories & Ensworth* for appellant.

*W. P. Hall* and *H. K. White* for respondent.

The question of the jurisdiction of the court over the subject matter may be raised at any stage of the proceedings. *Hannibal, &c., R. R. Co. v. Mahoney*, 42 Mo. 467; *State v. Lawrence*, 45 Mo. 543. The jurisdiction vested in probate courts is exclusive. *Dodson, Admr., v. Scruggs, Admr.*, 47 Mo. 285; *Cones v. Ward, Admr.*, 47 Mo. 289;

Ensworth v. Curd.

*Titterington, Admr., v. Hooker*, 58 Mo. 593; *Pearce v. Calhoun*, 59 Mo. 271.

HOUGH, J.—This suit was instituted in the circuit court of Buchanan county, and the petition alleges that the plaintiff and the intestate, Bassett, were, in the life-time of the latter, engaged as partners in the purchase and sale of real estate. An account is stated by the plaintiff of the various sums of money paid out and received by Bassett and himself respectively, in the purchase and sale of real property and on other accounts, (incident thereto during the existence of the co-partnership,) and the plaintiff asks for an adjustment of said accounts, and that certain real property to which Bassett had taken a deed in his own name, and of which he died seized, be declared to be partnership property and subjected to the payment of any balance found to be due plaintiff on final settlement of their accounts.

A court possessed of general equity powers is undoubtedly the proper tribunal in which to settle the affairs of a co-partnership between the living. But when the co-partnership has been dissolved by the death of one of the partners, the settlement must be made under the provisions of the administration law, and for this purpose the probate court exercises to a certain extent chancery powers. *Pearce v. Calhoun*, 59 Mo. 271. If the surviving partner fails to administer within the time prescribed by law, the executor or administrator of the estate of the deceased partner is required to give bond, and to forthwith take the whole partnership estate into his own possession, and he is authorized to use the name of the survivor in collecting the debts due the late firm if necessary, and shall, with the partnership property, pay the debts of the firm and the costs of administration, and pay the surviving partner his proportion of the excess, if there be any. And the surviving partner is to surrender to the administrator on

I. JURISDICTION OF  
PROBATE COURT:  
partnership : set-  
tlement

Ensworth v. Curd.

demand all the property of the partnership, including their books and papers and all necessary documents pertaining to the same, and to afford the administrator all reasonable facilities for the execution of his trust. Gen. Stat., §§ 59, 61, chap. 120, p. 486. And by the 63rd section of the same chapter the probate court is expressly invested with full jurisdiction to hear and determine all demands against the partnership, provided only, that the judgment or allowance in such case shall not bind any property of the survivor other than the partnership effects. In the present case the plaintiff has proceeded precisely as if Bassett were alive. This he could not do. The act creating the probate court of Buchanan invested that court with exclusive original jurisdiction "to hear and determine all suits and other proceedings instituted against executors and administrators upon any demand against the estate of their testator or intestate," and further declared that all laws relating to the administration of estates should be applicable to and in force in said probate court. Session Acts 1865-6, p. 83. The law imperatively requires that when a co-partnership is dissolved by death, the affairs of the firm shall be settled in administration. With the wisdom of this enactment we have nothing to do. The law is so written, it was competent for the Legislature so to enact, and it is our duty to enforce it. If upon settlement of the partnership accounts it shall be found that the firm is indebted to the plaintiff, and that there is property of the firm which it is necessary to resort to, to satisfy the plaintiff's demand, which cannot be reached through the instrumentality of the powers conferred upon the probate court, then the plaintiff may resort to such tribunal as has the requisite authority. As far as the jurisdiction of the probate court extends, it is exclusive, and it certainly extends to the settlement of the accounts of the firm. *Dodson, Admr., v. Scruggs, Admr.*, 47 Mo. 285; *Cones v. Ward, Admr.*, 47 Mo. 289; *Titterington v. Hooker*, 58 Mo. 593;

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*Pearce v. Calhoun*, 59 Mo. 271; *Wernecke v. Kenyon's Admr.*, 66 Mo. 284.

It is insisted that the act establishing the probate court of Buchanan county is unconstitutional, because it, in effect, amends several statutes which are not set forth; because the act relates to several subjects, all of which are not expressed in the title; because it is a special law, and because the judge is authorized to appoint a clerk. We see nothing in these objections requiring any extended notice. The first ground of objection is answered by the decision of this court in the *State ex rel. Speck v. Geiger*, 65 Mo. 306. As to the second the title of the act is, in our opinion, sufficiently comprehensive to include all the matters contained in the act.

Whether a general law could have been made applicable has been held by this court to be a question for the Legislature under the constitution of 1865. *State ex rel. Henderson v. Boone County Court*, 50 Mo. 317; *State ex rel. Robbins v. County Court New Madrid County*, 51 Mo. 83; *Hall v. Bray*, 51 Mo. 288.

That the judge was authorized to appoint a clerk in violation of the constitution would not invalidate other portions of the act. *Cooley's Con. Lim.*, 178.

When the court dismissed the plaintiff's suit for want of jurisdiction, it had authority to render a judgment against him for the costs he had improvidently incurred there. The judgment of the circuit court will be affirmed. All concur.

AFFIRMED.



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The State v. Bibb.

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THE STATE, *Appellant*, v. BIBB.

1. **Indictment:** VARIANCE. An indictment charged the forgery of a receipt purporting to be the receipt of "Charles W. Jeffries;" the receipt set out *in hæc verba*, was signed "C. W. Jeffries;" *Held*, no variance.
2. **Forgery of Written Instrument:** "receipt." The term "receipt" used in an indictment imports a written instrument.

*Appeal from Franklin Circuit Court.*—HON. A. J. SEAT,  
Judge.

Indictment for forgery. The indictment was in the following words:

STATE OF MISSOURI, }  
County of Franklin, } ss.

In the circuit court of said county of Franklin, November term, 1875:

The grand jurors of the State of Missouri, now here in court duly empaneled, charged and sworn to inquire within and for the county of Franklin aforesaid, upon their oath do present that William R. Bibb, late of the county of Franklin aforesaid, at and in the county of Franklin, and State of Missouri, on the 25th day of November, in the year of our Lord 1872, feloniously, falsely and fraudulently did make, forge and counterfeit a certain receipt, purporting to be the receipt of one Charles W. Jeffries, as administrator of one William D. Jeffries, deceased, which said forged receipt is as follows, to-wit:

"Franklin county, Missouri, November 25th, 1872. Received of William R. Bibb, former constable of Boles township, the sum of \$193.70, being the amount in full of judgments and interest to date, in the following suits, judgment being rendered in the court of Julius Kahrman, a justice of the peace of Boles township. William D. Jeffries' estate v. A. F. Stiles and Sam. Groff; William D. Jeffries' estate v. Jas. N. Hogan and D. S. Robertson; William D. Jeffries' estate v. Jas. H. Leathers and A.

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The State v. Bibb.

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Leathers; William D. Jeffries' estate v. Thomas Watson.  
The above being subject to Squire Kahrmann's books.

"C. W. JEFFRIES,

"Admr. of W. D. Jeffries' estate, deceased."

And that he, the said William R. Bibb, did then and there so falsely, fraudulently and feloniously make, forge and counterfeit the said forged receipt as aforesaid, with the intent to defraud, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said William R. Bibb, at and in the county and State aforesaid, on the 20th day of May, in the year of our Lord 1873, feloniously and knowingly, and with the intent to defraud, did utter and publish as true, a certain forged receipt, which last mentioned forged receipt is as follows, to-wit:

"Franklin county, Missouri, November 25th, 1872.  
Received of William R. Bibb, former constable of Boles township, the sum of \$193.70, being the amount in full of judgments and interest to date, in the following suits, judgment being rendered in the court of Julius Kahrmann, a justice of the peace of Boles township. William D. Jeffries' estate v. A. F. Stiles and Sam. Groff; William D. Jeffries' estate v. Jas. N. Hogan and D. S. Robertson; William D. Jeffries's estate v. Jas. H. Leathers and A. Leathers; William D. Jeffries' estate v. Thomas Watson. The above being subject to Squire Kahrmann's books.

"C. W. JEFFRIES,

"Admr. of W. D. Jeffries' estate, deceased."

He the said William R. Bibb, at the time he so uttered and published said last mentioned forged receipt as aforesaid, then and there well knowing the same to be forged, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

The defendant demurred, assigning the following reasons:

1st. Because said indictment charged no offense known to the law.

2nd. Because it is not charged in said indictment that by the instrument alleged to have been forged, any pecuniary demand or obligation was purported to be transferred, created, increased, discharged or diminished, or that by said instrument any rights of property whatsoever were or purported to be transferred, conveyed, discharged, increased or in any manner affected.

3rd. Because the indictment contains neither the words nor the substance of the statute creating the offense.

4th. Because the indictment fails to show that the instrument alleged to have been forged, would or could have been of any value if genuine.

The court sustained the demurrer and rendered final judgment for defendant. The State appealed.

*J. L. Smith*, Attorney-General, for the State.

*John R. Martin* for respondent.

HENRY, J.—The first count of the indictment is based upon the 16th, and the second count upon the 21st section of the act in relation to crimes and punishments, Wag. Stat., pp. 470, 471.

The first count charges defendant with having forged and counterfeited a receipt purporting to be the receipt of Charles W. Jeffries, setting out *in hæc verba* the receipt, which purported to have been signed by C. W. Jeffries. There is no question of variance, as there might have been, if the receipt had not been fully set out in the indictment. The allegation that it purported to be the receipt of Charles W. Jeffries is substantially an allegation that C. W. and Charles W. Jeffries were the same person.

The 16th section provides that: "Every person who,"

The State ex rel. Fichtenkamm v. Games.

with intent to injure or defraud, shall falsely make, alter, forge  
2. FORGERY OF  
 WRITTEN INSTRUMENT: or counterfeit any instrument or writing,  
"receipt." being, or purporting to be, the act of another, by which any pecuniary demand or obligation shall be, or purport to be, transferred, created, increased, discharged or diminished, &c., shall, on conviction," &c. The receipt in question purported to discharge a demand of Jeffries' estate against the defendant. It was not necessary to allege with any more particularity than it was alleged in the indictment, that the receipt was an instrument or writing. "There is no such thing as a verbal receipt, it is a solecism." *State v. Fenly*, 18 Mo. 445. The term "receipt" imports a written instrument. What has been said in regard to the first count answers all the objections to the second.

The demurrer to the indictment was improperly sustained, and all concurring, the judgment is reversed and the cause remanded.

REVERSED.

THE STATE *ex rel.* FICHTENKAMM, *Appellant*, v. GAMES.

1. **Statutory Appointment of Receiver:** AUTHORITY TO SUE. A receiver appointed under Gen. Stat., chap. 199, secs. 52, 53, (Wag. Stat., p. 1048,) cannot maintain an action, in his own name, against the sureties on the bond of his predecessor.

**A Receiver** is not a trustee of an express trust.

2. **Receiver:** SURETIES: CONSTRUCTION OF "DEBT." The liability of sureties on an official bond is not a "debt" which, under the 31st section of the attachment law, a receiver is authorized to sue for in his own name.
3. **Per Henry, J.** Wag. Stat., secs. 52, 53, p. 1048, relate only to receivers appointed "to keep and preserve money or other things deposited in court, or that may be the subject of a tender;" not to such as are appointed under the general equity powers of a court of chancery. The latter have no power to sue in their own names.

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The State ex rel. Fichtenkamm v. Gambs.

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*Appeal from St. Louis Circuit Court.*—HON. JAS. K. KNIGHT,  
Judge.

*Thos. Espy* for appellant.

*Dryden & Dryden* and *Pope & McGinnis amici curiae.*

The first instance in which the office of receiver is alluded to in the legislation of this State is found in the practice act of 1849, which abolishes the distinction between actions at law and suits in equity. By article 10 of that act it is provided: "Sec. 1. Until the Legislature shall otherwise provide, the court may appoint receivers and direct the deposit of money or other thing in court, and grant the other provisional remedies now existing according to the present practice, except as otherwise provided in this act." Laws of 1849, p. 86. Following that article in time, and in its suggestions, was the attachment law of 1855, by which it is provided: Sec. 37. "The court, or in vacation the judge may in a proper case, on the application of the plaintiff, appoint a receiver." \* \* "Sec. 38. When notes, bills, books of account, accounts or other evidences of debts are attached, they \* \* shall be delivered to the receiver, who shall \* \* settle and collect the same. For that purpose he may commence and maintain actions on the same *in his own name.*"

\* \* R. S. 1855, pp. 249, 250, §§ 37, 38. The execution law of 1855 provided; "Section 18. All account books, accounts, notes, bills, bonds, certificates of deposit, and other evidences of debt, belonging to a person against whom an execution shall be issued, shall be liable to be seized, and when seized shall be placed in the hands of a suitable person, to be appointed by the court or judge thereof in vacation, as a receiver, who shall take the same oath, execute like bond, have and perform the same powers and duties, and be subject, he and his securities, to the same provisions and penalties in all respects as in the case

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of a receiver and his securities appointed in virtue of the act providing for suits by attachment." R. S. 1855, p. 741. The act of 1855, regulating practice in civil cases, R. S. 1855, p. 1271, provided: "Sec. 53. The court shall have power to appoint a receiver, whenever such appointment shall be deemed necessary, whose duty it shall be to keep and preserve any money or other thing deposited in court, or that may be the subject of a tender, subject to the order of court. Sec. 54. Such receiver shall give bond and have the same powers and be subject to all the provisions, as far as they may be applicable, enjoined upon a receiver appointed in virtue of the law providing for suits by attachment." These several provisions in the laws of 1855 are carried bodily, in the very same phraseology, into the revision of 1865, and are to-day in full force and parts of the law of the land. 1 Wag. Stat., 187, §§ 30, 31; Id., 606, § 20; 2 Wag. Stat., 1048, §§ 52, 53. See also 41, § art. 2, insurance law, Wag. Stat., 754.

The section of the practice act conferring the power to sue, Wag. Stat., § 53, p. 1048, it must be confessed, is awkwardly constructed, and expressed in ill-chosen words, but its intent is nevertheless apparent. It was a clumsy attempt to express the same meaning that was so well expressed by the 20th section of the execution law. 1 Wag. Stat., 606. The manifest object of the framer of the section was, in the interest of brevity, to adopt the law regulating suits by attachment, so far as that law had application to the subject, as the rule by which the powers, duties and responsibilities of the receiver should be determined.

The tendency of legislation and of the courts has been of late in favor of the power of the receiver to sue. *Manlove v. Burger*, 38 Ind. 211. Several courts of authority have held that the receiver may and ought to sue in his own name. *Wray v. Jamison*, 10 Hump. 186; *Helm v. Littlejohn*, 12 La. An. 298; *Baker v. Cooper*, 57 Me. 388; *La-throp v. Knapp*, 57 Wis. 232.



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*Kehr & Tittman and Philip Donahue* for respondent.

The proposition that the receiver cannot sue in his own name is sustained by the following cases: *Yeager v. Wallace*, 44 Pa. St. 294; *Justine v. Kerlin*, 17 Ind. 588; *Manlove v. Burger*, 38 Ind. 211; *King v. Cutts*, 24 Wis. 627; *Freeman v. Winchester*, 18 Miss. 577; *Battle v. Davis*, 66 N. C. 252; *Taylor v. Allen*, 2 Atk. 213; *Pitt v. Snowdin*, 3 Atk. 750.

The cases to the contrary will, upon examination, prove to be founded upon statutes, or, as in Louisiana, upon the civil law. See also *Marcedon v. State*, 24 Ind. 370; *Owens v. State*, 25 Ind. 107; *Chipman v. Sabbaton*, 7 Paige Ch. 47; *Ingersoll v. Cooper*, 5 Black. 427; *LaFallet v. Aikin*, 36 Ind. 1.

HOUGH, J.—In a proceeding in the circuit court of St. Louis by one of the firm of Hoffelman & Franke, for a dissolution of the co-partnership, Charles A. Snell was appointed receiver of the assets of the firm, and on the 24th day of June, 1868, as such receiver, executed a bond for \$20,000 to the State of Missouri, with Charles W. Horn and John Bruch as sureties. On the 2nd day of July, 1870, the relator was appointed receiver to succeed Snell, and under the direction of the court instituted the present action in his own name against the sureties on the bond of his predecessor. The defendants filed a demurrer to the petition, which was sustained, and final judgment entered thereon, from which the plaintiff has appealed.

Our statutes provide that every action shall be presented in the name of the real party in interest, except that an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, may sue in his own name, without joining with him the person for whose benefit the suit is prosecuted. Gen. Stat. 1865, p. 651, §§ 2, 3. A trustee of an express trust is defined to be a person with whom, or

I. STATUTORY AP-  
POINTMENT OF RE-  
CEIVER: authority  
to sue.

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in whose name, a contract is made for the benefit of another. Section 3, *supra*. The plaintiff is neither executor, administrator nor trustee of an express trust. Is he expressly authorized by statute to sue in his own name? Sections 52 and 53, chap. 169, Gen. Stat., relating to practice in civil cases, are as follows: "Sec. 52. The court shall have power to appoint a receiver whenever such appointment shall be deemed necessary, whose duty it shall be to keep and preserve any money or other thing deposited in court, or that may be the subject of a tender, subject to the order of court." "Sec. 53. Such receiver shall give bond, and have the same powers, and be subject to all the provisions, as far as they may be applicable, enjoined upon a receiver appointed in virtue of the law providing for suits by attachment." The phraseology of the foregoing sections is somewhat wanting in perspicuity, but we think ourselves warranted in holding that they were intended to give a statutory authority for the appointment of receivers in all cases not otherwise specially provided for, and to prescribe their duties. Viewed in this light, the duty named in the 52nd section of keeping and preserving any money or other thing tendered or deposited in court, is in enlargement of the ordinary functions of receivers, and not expressive of their whole duty. If the receivers authorized by the 52nd section were intended to be restricted to the duties of simple bailees of money or property tendered or deposited, it was entirely superfluous to confer upon them the powers and duties of receivers in attachment, inasmuch as their special property as bailees would authorize them to maintain actions in their own names to recover such property when unlawfully taken from their possession, or damages for the conversion thereof, or for injury thereto. In order to determine, therefore, what other statutory powers have been conferred upon receivers, reference must be had to the law regulating the appointment of receivers in suits by attachment. The sections of that act material to the present inquiry, are as

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follows: "Sec. 30. The court, or in vacation, the judge may in a proper case, upon the application of the plaintiff, appoint a receiver, who shall take an oath faithfully to discharge his duty, and shall enter into bond to the State of Missouri, in such sum as the court or judge may direct, and with security approved by the court or judge, for the faithful performance of his duty as receiver, and that he will pay over all money, and account for all property which may come into his hands by virtue of his appointment, at such time and in such manner as the court may direct; this bond may be sued on in the name of the State, at the instance of and to the use of any party injured." "Sec. 31. When notes, bills, books of account, accounts, or other evidences of debt, are attached, they shall not be subject to be retained upon the execution of a delivery bond, as hereinbefore provided, but shall be delivered to the receiver, who shall proceed with diligence to settle and collect the same. For that purpose he may commence and maintain actions on the same, in his own name, but in such actions no right of defense shall be impaired." Sec. 32. The receiver shall, forthwith, give notice of his appointment to the persons indebted to the defendant. The notice shall be written or printed, and shall be served on each debtor by copy delivered to him, or left at his place of residence or business; or if he reside in another county by copy deposited in the post office and addressed to him at his place of residence; and from the date of such service and knowledge thereof, every such debtor shall stand liable, and shall account to the receiver for the amount of moneys and credits of the defendant in his hands, or due from him to the defendant."

These sections make the debtors of the defendant in the attachment liable to the receiver after notice of his appointment, and authorize the receiver to sue such debtors in his own name. The statute specifies notes, bills, books of account, accounts or other evidences of debt, as the obligations on which the receiver

2. RECEIVER: sur-  
eties: construc-  
tion of "debt"

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may maintain actions in his own name. As the plaintiff here can have no other or greater authority to sue in his own name than the receiver in attachment proceedings, the question arises whether the sureties on an official bond, after forfeiture, are the debtors of an injured beneficiary, and whether their liability on such bond falls within the class of obligations which the receiver may enforce in his own name. This identical question was considered and decided by this court in the case of *Eddy v. Heath's Garnishees*, 31 Mo. 141. In that case one Twitchell, who was United States marshal, collected money under an execution in favor of one Heath, which he failed to pay to him, and afterwards died indebted to him therefor. In an attachment suit against Heath the sureties on the official bond of Twitchell were garnished as the debtors of Heath. Judge Scott, who delivered the opinion of the court, said: "Admitting that Twitchell himself was a debtor to Heath in respect of his having collected money for him on an execution, which he failed to pay over and might have been sued for in an action of assumpsit without resorting to a suit upon his bond, yet his securities were liable to no such action, and could only be sued upon the bond for the official misconduct of their principal. If the securities are debtors to him who is injured by the misconduct of the marshal, their indebtedness must arise by reason of the bond. Then, if they are debtors for one illegal act of their principal, they must be for all such acts. If a marshal fails to execute any process coming to his hands, are his securities debtors for the damages which may be recovered for such a breach of duty by their principal? If the marshal is guilty of a trespass in taking the goods of one on an execution against another, are his securities debtors to the injured person for the wrong committed? We do not maintain that the sureties are not liable to an action on the bond, and will not be compelled to satisfy any judgment that may be obtained against them; but we do maintain that an illegal act of the marshal, causing an injury to an-

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other, does not render his sureties debtors to the injured person in the sense in which that word is ordinarily used in the law, nor in that sense in which it is employed in the statutes concerning attachments." It is manifest from the foregoing extract that a receiver in attachment cannot maintain an action in his own name, or any action against the sureties on an official bond for the reason that such liability is not a debt, and is not subject to attachment. As the relator, in his capacity of receiver, has no greater authority to sue in his own name than a receiver in attachment, it is quite clear the present action cannot be maintained against the sureties on the bond of Snell.

The judgment of the circuit court will, therefore, be affirmed. All concur except Judge HENRY, who concurs in the result.

AFFIRMED.

HENRY, J.—The office of receiver had its origin in equity practice, and to that practice we must look to ascertain the rights and duties of receivers when not prescribed by statute. The order appointing a receiver does not affect the title of the property. He is but an officer of the court and subject to its orders. He holds the property merely as a custodian, and cannot sue to recover any of it in possession of a third person who claims to be the owner, or on any chose in action without an order of the court authorizing such suit, and then only in the name of the legal owners—in this case the firm of whose assets he was appointed receiver. These propositions are fully sustained by Daniel's Ch. Practice, vol. 2, 1748; *Yeager v. Wallace*, 44 Penn. 294; *Battle v. Davis*, 46 N. C. 255; *King v. Cutts*, 24 Wis. 625. A suit by the receiver to recover property of which he had obtained possession, but which has been taken from him, rests upon a different ground. In such a case his former possession created a special property which will support the action.

Appellant relies upon Wag. Stat., secs. 52, 53, p. 1048.

Sec. 52 provides for the appointment of a receiver whenever deemed necessary by the court, to keep and preserve any money or other thing deposited in court, or that may be the subject of a tender. Sec. 53 requires such receiver to give bond, and confers upon him the same powers as are given to a receiver appointed under the attachment law. These sections have no relation to the rights or duties of receivers appointed under the general power of the court to appoint receivers in what, before the adoption of the code were chancery cases, but apply by express terms only to one appointed "to keep and preserve money or other thing deposited in court, or that may be the subject of a tender." That such an officer had no right to sue in his own name, as a trustee of an express trust, seems to have been the impression of the law-makers, otherwise the right to do so would not have been expressly conferred by that statute. A receiver is not a trustee of an express trust, and it did not require the 2nd section of the 1st article of our practice act to enable a trustee of an express trust to sue in his own name. That section is, in substance, but a proviso to the preceding section, which requires all actions to be brought in the name of the real parties in interest, and but for the 2nd section, executors, administrators and trustees of express trusts, who could always, at common law, sue in their own names, would have been deprived of that right. The receiver was appointed in a suit which, before the adoption of the code, was a chancery cause, and his rights, duties and powers are to be determined by the rules which prevail in the practice in chancery. I see no good reason why the law should not be otherwise, but it was the common law as we adopted it, and it is for the Legislature, and not for this court, to confer other powers upon receivers than those with which they were clothed by the common law.

I concur in affirming the judgment, but do not agree with the majority of the court that the receiver has a right to sue in his own name at all for debts due the partnership,



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or to sue in the name of the firm without an order of the court appointing him, expressly authorizing him to do so.

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BUTLER, *Plaintiff in Error*, v. DORMAN.

**Agency:** AUTHORITY TO RECEIVE PAYMENT. An agent who sells by sample and on credit, and is not intrusted with the possession of the goods to be sold, has no implied authority to receive payment. *Rice v. Groffman*, 56 Mo. 434, distinguished.

*Error to Henry Circuit Court.*—HON. F. P. WRIGHT, Judge.

R. C. *McBeth* for plaintiff in error.

The authority of Ridgely, the agent, was that of a broker. A broker has no authority as such *virtute officii* to receive payment for goods sold by him; and if payment is made to him by the purchaser, it is at his own risk. Story on Agency, § 109; Dunlap's Paley on Agency, § 270; *Higgins v. Moore*, 34 N. Y. 417. The cases of *Sumner v. Sands*, 51 Mo. 89; *Brooks v. Jameson*, 55 Mo. 505, and *Rice v. Groffman*, 56 Mo. 434, all relate to agents acting in the capacity of factors and not as brokers.

Chas. B. *Wilson* for defendant in error.

HENRY, J.—This was an action for the recovery of the balance of an account alleged to be due from Dorman to the plaintiffs. On the 12th day of September, 1874, the plaintiffs employed Wm. S. Ridgely as a traveling agent to sell goods for them by sample in the State of Missouri. On the 6th day of October thereafter, less than a month after his employment, he sold to defendant, on four months time, two bills of goods, one for \$346.43, and the other for

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§27.25. The agent was not intrusted with possession of the goods sold, and was expressly forbidden, by the terms of his employment, to receive payment for goods sold.

On the 12th day of October, 1874, six days after he sold the goods to the defendant, Ridgely drew a draft on the defendant for \$60, and wrote requesting him as an especial favor to him to pay the draft, promising to return the money when he again reached Clinton, or to credit the amount on the bills of goods; that he expected to return to Clinton, where defendant resided, in about ten days. Defendant paid plaintiffs all the bill except \$60, insisting that he was entitled to a credit for that amount paid to Ridgely.

A jury was waived and the cause was tried by the court. The principal question for determination is presented by the first declaration of law given by the court, which was: "That if the court find from the evidence that Wm. S. Ridgely was the agent of plaintiffs only to sell merchandise by sample for plaintiffs, and that in the month of October, 1874, defendant purchased of plaintiffs, through their agent Ridgely, the bill of goods in controversy, and that some few days after said purchase said agent drew on defendant for \$60, which defendant paid, then defendant is not entitled to a credit for said sum on said bill of goods against plaintiffs, unless said amount was by said agent paid over to plaintiffs, or unless said agent was authorized by plaintiffs to receive payment on such sales; but such authority to receive payment need not be express, it may be implied from the fact of selling, unless the contrary appears." *Sumner v. Sands*, 51 Mo. 89; *Brooks v. Jameson*, 55 Mo. 505, and *Rice v. Groffman*, 56 Mo. 434, are relied upon as sustaining the principle announced in that instruction.

In *Sumner v. Sands* the court construed the card recognizing Shriver as plaintiff's agent, as creating a general agency. Said Adams, J.: "By the card read in evidence, which is admitted to be genuine, Shriver was held out to

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the people of Shelby county as a general agent for plaintiff for that county." Shriver also had possession of the sewing machine when he sold it to the defendant. In *Brooks et al. v. Jameson* there is nothing analagous to this case. There the purchasers of the threshing machine from an agent were told, pending the negotiations for the sale, that they could pay the notes at Cameron, Missouri. Two of the notes were paid to the agents at Cameron. Vories, J., who delivered the opinion of the court, observed that "the plaintiffs, when the second note became due, had written to defendants requesting them to pay it to these same agents. This they had been told by the agents when the notes were given, was the way the payments were to be made. If the plaintiffs had by this course of dealing held out those men at Cameron as their agents to receive the money, and this induced the defendants to pay the money to the agents, they ought to be concluded thereby."

*Rice et al. v. Groffman* is no authority for the doctrine of the instruction in question. It is true it is there stated in general terms that "a power to sell goods includes a power to receive payment," but the ground upon which the decision was based appears in that paragraph of the opinion in which Judge NAPTON said: "Whatever the plaintiffs may say as to the agency of Berlzheimer, it is clear that he negotiated and effected the sale to defendant, that he had the cigars and delivered them, and there was nothing to show that he was not the owner except the bill; and conceding he was not, the presumption was that, as he had authority to sell, he had authority to receive payment."

The distinction between factors and brokers has long been settled. A factor is one to whom goods are consigned for sale. He has the possession and a special property, and on a sale may receive payment. A broker has not possession of the goods. Said Peckham, J., in *Higgins v. Moore*, 34 N. Y. 418: "It has been questioned among civilians, says Livermore, whether an authority to sell or let includes an authority to receive the price or not, and that Porthier

says this power is not generally included. 1 Liv. on Agency, 74; Porthier's *Waite des obligations* 477; but, that in some cases it will be presumed, as if goods are put into the hands of public brokers to be sold, and they are in the habit of receiving the price. Putting the goods in their hands implies an authority to receive payment, as it does to receive payment on securities. 2 Liv., 284, 285; 3 Chitty Crim. Law, 207, 208."

In *Rice v. Groffman*, NAPTON, J., cites Story on Agency, sec. 102, for the general proposition that "a power to sell goods includes a power to receive payment on the sale," but Judge Story qualifies that general proposition with a proviso that the payment is made at the time of the sale, and in a note it is stated that the purchaser cannot pay the agent at a subsequent time, unless there be some proof of authority other than a mere power to sell. *Seiple v. Irwin*, 30 Pa. St. 513; *Law v. Stokes*, 32 N. J. (Law) 249.

In *Seiple v. Irwin* the court said: "It is undeniable that an agent to whom merchandise has been intrusted with authority to sell and deliver it, is authorized to receive the price; otherwise the fraud on the purchaser would run into cruelty. This agent's powers were not embraced in that description. He was employed only to make sales. As a check, his employers seem to have retained in their own hands the delivery of the goods and the appointment of the terms of sale. The goods in question were so delivered as to inform the defendant sufficiently of the character of the agency. When the agreement had been made for payment in six months, the contract was complete. The subsequent acceptance of cash, with a deduction of five per centum from the bill, was a new and totally unauthorized arrangement on the agent's part. In making payment, the defendant took the risk of his integrity, and they must bear the loss which his unfaithfulness imposed."

These remarks are strikingly applicable to the case we are considering. Here the goods had been sold on four

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months credit, and six days after the sale was accomplished the agent drew the draft in question, which defendant paid. In *Law v. Stokes* 32 N. J. (Law) 250, the doctrine of *Seiple v. Irwin* was approved, and the court said: "An agent employed to make sales, and selling on credit, is not authorized subsequently to collect the price in the name of the principal, and payment to him will not discharge the purchaser, unless he can show some authority in the agent other than that necessarily implied in a mere power to make sales." Again, "Where an agent is intrusted with the possession of goods with an unrestricted power to sell, or payments are made over the counter of the principal's store to a shopman accustomed to receive money there for his employer, the authority to receive payment will be implied in favor of innocent persons, because the principal, by his own act, gives to the agent an apparent authority to receive such payment."

From these and other authorities that might be cited, it seems clear that where the principal has clothed the agent with the *indicia* of authority to receive payment, as by intrusting to him the possession of the goods to be sold, the purchaser is warranted in paying the price to the agent, but when the agent has not the possession of the goods, or other *indicia* of authority, and is only authorized to sell, if the purchaser pays the price to the agent he does so at his peril, and it devolves upon him, in a suit for the purchase money by the principal, to prove that the agent was also authorized to receive payment.

The declaration by the court that authority to receive payment by the agent might be implied from the authority to sell, was incorrect. The judgment is reversed and the cause remanded. All concur.

REVERSED.

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The State v. Mohr.

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THE STATE, *Appellant*, v. MOHR.

**Embezzlement: PARTNERSHIP: INDICTMENT.** In an indictment under Wag. Stat., sec. 35, p. 458, for embezzling the money of a co-partnership, the names of the individual partners need not be set out.

*Appeal from Jasper Circuit Court.*—HON. JOSEPH CRAVENS, Judge.

Indictment quashed for insufficient averments. State appeals.

J. L. Smith, Attorney-General, with *Harding & Buller* for the State.

The indictment was found under Wag. Stat., sec. 35, p. 458, for embezzling money of a co-partnership; and the names of the individual partners is immaterial. Wag. Stat., sec. 27, p. 1090, provides: "No indictment shall be deemed invalid \* \* \* for any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant *upon the merits*," and sec. 22, p. 1089 provides that no defect in name of any party, &c., shall be material unless the trial court shall find the defect prejudicial to the defendant. This implies that it must be so found *on the trial or the merits*. The gravamen of the offense is the embezzlement of property coming into his hands by virtue of his employment by a co-partnership. The question of the strict title to the property is immaterial. *State v. Moore*, 61 Mo. 276; *State v. Barker*, 64 Mo. 282; *State v. Flint*, 62 Mo. 393; *State v. Clarkson*, 59 Mo. 149; *State v. Martin*, 28 Mo. 530; *State v. Porter*, 26 Mo. 201; *State v. Scott*, 48 Mo. 422; *Hobbs v. State*, 9 Mo. 855; *McDonald v. State*, 8 Mo. 283. Had the indictment described the property as that of some person unknown, it would have been good. *State v. Martin*, *supra*; *State v. Cortell*, 53 Mo. 124.

Respondent files no brief.



NORTON, J.—Defendant was indicted at the September term, 1877, of the Jasper county circuit court under Wag. Stat., sec. 35, p. 458. The indictment contains two counts both of which, on defendant's motion, were quashed, and judgment rendered, from which the State has appealed. The indictment in the first count alleges that defendant at, &c., being the agent and collector of a co-partnership, to-wit: Wm. C. Wilson & Bro., (and over the age of sixteen,) without the consent of said Wilson & Bro., did unlawfully and feloniously convert to his own use and embezzle the sum of \$1,050 of money, the property of said Wilson & Bro., which said money came into his possession and under his control by virtue of his said agency and employment. The said count only varies from the first in charging defendant with taking, making way with, and secreting the said sum of money with intent to convert and embezzle the same to his own use.

The principal ground of objection urged to the indictment is that it does not set out the names of the persons composing the co-partnership.

The offense for which the defendant is indicted is of statutory creation, and in an indictment preferring the charge it is sufficient for the pleader to follow the language of the statute. *State v. Coulter*, 46 Mo. 565; 32 Mo. 563. This we think has been done. It is true that the indictment only alleges that defendant was the agent and collector of a co-partnership known under the name of Wm. C. Wilson & Bro., and does not set out the names of the individual partners. This is unnecessary under the phraseology of the section on which the indictment is framed. The common law rule which required the individual names of partners to be set out when property of the partnership was alleged to have been stolen, has been changed in England by express enactment of Parliament. 2 Russell on Cr., (7 Am. Ed. 1853) top page 385, side page 386.

We think the rule has been modified by Wag. Stat., sec. 27, p. 1090, which declares that "no indictment \*

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The State v. Simms.

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\* shall be deemed invalid for any defect or imperfection which does not tend to the prejudice of the substantial rights of defendant upon the merits." We cannot perceive how the omission to state the names of the individual members of the firm of Wm. C. Wilson & Bro. could have affected the substantial rights of defendant upon the merits. It would have been no less a co-partnership in whose employ defendant was obliged to be, whether it was composed of Wm. Wilson and John Wilson, or Wm. Wilson and James Wilson. The statute defining the offense brings within the penalty of it any agent or collector of a "co-partnership," and the indictment charges the defendant with being such agent, and states the style and name of the co-partnership. This we think sufficient. In case of *People v. Ah. Sing*, 19 Cal. 598, where the property was alleged to belong to a partnership, it was held that it was unnecessary to give the names of the members composing it.

We think the court erred in sustaining the motion to quash the indictment, and will, therefore, reverse the judgment and remand the cause. All the judges concur.

REVERSED.

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THE STATE V. SIMMS, *Appellant*.

1. **Requisites of Affidavit for Continuance.** An affidavit for a continuance on the ground of the absence of witnesses, must state that there are no other witnesses obtainable by whom the facts sought to be proved by the absent witnesses could be proved, and must show diligence in attempting to procure the presence of the absent witnesses.
2. **Insanity: INSTRUCTIONS.** On the trial of an indictment for murder where the insanity of a prisoner was set up as a defense, the court instructed the jury that the fact that some or all of the ancestors of a person had been insane, did not of itself prove that person insane,

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and that in the absence of direct and preponderating evidence of insanity at the time of the killing, it could not be justified on that plea; *Held*, error.

3. ———: CONTRADICTORY INSTRUCTIONS. The giving of contradictory instructions may afford sufficient ground for reversal.

*Appeal from Howell Circuit Court.*—HON. J. R. WOODSIDE,  
Judge.

Indictment for murder. The facts are stated in the opinion.

*A. H. Livingstone and E. Y. Mitchell* for appellant.

*J. L. Smith*, Attorney-General, for the State.

HENRY, J.—At the April term, 1878, of the Howell circuit court, the defendant was indicted for the murder of one James Reese.

The indictment was found by the grand jury on the 23rd day of April, and on that day the defendant made an application for a change of venue, which was refused on the 24th; on the 26th the defendant applied for a continuance, and his affidavit was as follows: "Now, at this day, comes James Simms, the defendant in this case, and moves the court for a continuance on account of the absence of witnesses whose testimony is wanted; that this testimony is material in this cause, and that he cannot safely proceed to trial without such witnesses; that the indictment herein was returned against him at this term of the court, and that it is impossible for him, under the circumstances, to obtain such witnesses at this term of the court, in consequence of the short time that he has allowed him; that his witnesses reside in the counties of Shannon, Oregon, Butler and Howell, in this State; that affiant has good reason to believe, and does believe, that he will be able to procure the testimony and attendance of said witnesses at the next regular term of this court; that this application for continuance of this cause is not made for the

purpose of vexation or delay, but that substantial justice may be done, and that affiant has a good and meritorious defense to this cause."

It will be observed that the affiant did not state that there were no other witnesses present by whom he could prove the same facts he expected to establish by the absent witnesses. He did not state any facts constituting diligence in attempting to procure the presence of the absent witnesses, and on these grounds my associates think the action of the court overruling the the motion was proper.

I think it otherwise. There was no cause for trial until the indictment was returned into court. Until then it was not the duty of the prisoner, nor had he the right to have subpoenas issued to compel the attendance of witnesses. The indictment was returned into court on the 23rd, and the cause was called for trial on the 26th, when the application for a continuance was made. The witnesses resided in the counties of Shannon, Oregon, Butler and Howell, and it is apparent that the defendant had not had time to procure their attendance. If it had been a second application, or if the term of court had continued several weeks after the indictment was found, and between then and the calling of the cause for trial, the defendant had had ample time to get ready for the trial, and used no more diligence than his affidavit disclosed, the application would have been properly refused; but in the language of Wagner, J., in the *State v. Klinger*, 43 Mo. 127: "Considering the short time that intervened between his arraignment and his being put upon trial, it was scarcely to be expected that he could have obtained the desired testimony. Under all the circumstances, it seems to me that it would have better comported with the humanity of the law to have sustained the application and given defendant another continuance." As, however, my associates think otherwise, it is useless to discuss the question.

That defendant shot and killed Reese, is not denied,

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but the evidence showed that he and Reese were on good terms, and that defendant went to his house to pass the night; that Reese was absent, and was not expected by the family to return home until the next morning. The defendant had had a difficulty with one Hudlow, who resided in the neighborhood. Between sundown and dark, Reese, unexpectedly to the family, returned home, and as he was in the yard approaching the house, Simms went to the door, and said, "Gentlemen, what will you have?" and fired his pistol, the shot taking effect in the body of Reese, who shortly afterwards died of the wound. The testimony of Mrs. Reese, widow of the deceased, was that when Simms got up, he said he heard somebody, and went to the door. He helped carry Reese into the house, went for a physician, and, in the language of Mrs. Reese, "spread the news among the boys as he went." She further testified that Mr. Reese exclaimed, after he was shot, "Lord, John, you have killed me." Simms said "he thought it was Hudlow."

The defense relied upon was, that defendant was insane, and also that he shot under the apprehension that Hudlow was coming to Reese's house to attack him.

It is very clear that he did not intend to shoot, or kill Reese, but that is no excuse if he shot intending to kill Hudlow without reasonable ground to believe that Hudlow was about to do him some great bodily harm. Defendant may have had such an apprehension, but it was an insane hallucination if he had, because Hudlow was not there, nor is there a particle of evidence to show that defendant had any grounds for believing that Hudlow intended him any harm. There is but little evidence as to the difficulty between defendant and Hudlow, in fact the only evidence was that there had been a difficulty.

The evidence strongly tended to prove the insanity of defendant, but there was a conflict of evidence on that issue, and the instructions given by the court on that subject generally, are in harmony

with the decisions of this court; one, the fifth for the State, was erroneous. It declares that the fact that some or all of the ancestors of a person have been insane, does not of itself prove that person insane, and if there is no direct and preponderating evidence of insanity of defendant at the time he killed Reese, the jury cannot justify or excuse the killing on that plea.

The vice of that instruction is, that it requires direct proof of insanity. What is meant by the term "direct," in that connection, I cannot tell, but it was calculated to make an impression upon the minds of the jury that evidence of the insanity of one of defendant's aunts and two of his sisters, which was proved, was not worthy of much consideration, but the evidence must be *direct* that defendant was insane. Direct evidence would be that of medical experts, that they had examined the defendant and found him insane, or of persons who had been familiar with him, and from their personal observation believed him insane. If the instruction means anything, it was intended to exclude from the consideration of the jury all other evidence of insanity. An act which would not indicate the insanity of a person in whose family there had been no case of insanity, might be a very strong circumstance to prove insane, a person whose aunt had died in a mad-house, and two of whose sisters were maniacs.

It may be urged that this error was cured by the fifth instruction for defendant, "that the fact of defendant's insanity may be established by facts and circumstances as well as by direct evidence." That instruction is not explanatory of the fifth for the State, but is in direct conflict with it. One states that nothing but direct evidence will be sufficient, and the other that direct evidence is not required to prove insanity. Which would the jury adopt as a guide? What is there to indicate to them which should govern them? The possibility, that under the circumstances, they were misled by the fifth instruction for the State, is a sufficient ground for

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the reversal of the judgment. Even in civil cases judgments are reversed because the trial court gave contradictory instructions. *Simmons, Garth & Co. v. Roberts*, 60 Mo. 581. See also *State v. Mitchell*, 64 Mo. 191.

If the character of the evidence and the crime showed that the defense of insanity was a mere pretext, we should listen with more favor to the argument that the instructions, all taken together, presented the case fairly enough to the jury, but in the view we take of the whole case, we think that justice will be subserved by remanding the cause for a new trial.

The judgment is, accordingly, reversed and the cause remanded. All concur.

REVERSED.

SHERWOOD, C. J., agrees with HENRY, J., that the court should have granted defendant a continuance.

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CRAMER V. BACHMANN, *Appellant*.

1. **Partnership:** WHEN ONE PARTNER ENTITLED TO COMPENSATION FOR PERSONAL SERVICES RENDERED THE FIRM. Whether a partner is entitled to remuneration for services rendered the firm, depends upon the intention of the parties; an express agreement is not necessary, and in order to ascertain whether such compensation should be allowed, the circumstances which surrounded the parties, and their relative situations towards each other should be considered.
2. —: CASE IN JUDGMENT. Defendant, a skilled culturist, entered into partnership with plaintiff for the growing of grapes and the manufacture of wine. Plaintiff purchased a tract of land for such purpose, an undivided one-half of which was to be deeded to defendant, the amount paid for same by plaintiff being refunded to him out of profits realized. Nothing further was agreed upon at the time of the formation of the partnership. Defendant built a dwelling house and wine cellar, expended labor and capital of his own, and made a fruitful vineyard and extensive orchard on the tract. Plaintiff was engaged almost exclusively in an independent

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business of his own. Subsequently defendant, dissatisfied with the failure of plaintiff to convey to him the undivided half of the premises, sent the key of the wine cellar to plaintiff, and made preparations to return to St. Louis, from whence he, at plaintiff's request, had come, when plaintiff made the deed, and handed defendant a written agreement, signed by himself alone, which writing gave recognition to the idea that defendant was entitled to remuneration for both prior and subsequent labors in the interest of the firm. This writing defendant refused to sign, not regarding the compensation therein specified as sufficient, but returned again to his labors, in which he continued until the present proceeding resulted in a decree for dissolution. A referee having been appointed, took an account and made report, which was approved, except in one particular, which was the allowance to defendant for services to the firm, there being no articles of co-partnership, and no writing or express agreement for the allowance of such compensation; *Held*, that the allowance was properly made.

*Appeal from Cape Girardeau Court of Common Pleas.—*  
HON. H. G. WILSON, Judge.

*Houck & Ranney* for appellant, cited *Lewis v. Moffett*, 11 Ill. 398; *Marsh's Appeal*, 69 Pa. St., 30; *Bradford v. Kimberly*, 3 Johns. Ch. 431, and *Story on Partnership*, § 182.

*Wilson Cramer* for respondent.

It is well settled that one partner is not entitled, as against the other partners or the firm, to any compensation, commission or reward for his skill, labor or services employed in the partnership business, unless there be an express agreement to that effect. *Story on Partnership*, (5 Ed.) § 182, and cases cited in note 5; *Ibid*, § 185, and cases cited; *Parsons on Contracts*, vol. 1, (4 Ed.) bottom page 197; *Lewis v. Moffett*, 11 Ill. 392; *Bennett v. Russell*, 34 Mo. 524. All the authorities concur that the agreement must be express or special, and cannot be implied, except, perhaps, when the parties themselves have made previous settlements upon that basis, or where the services are such as were outside of the immediate scope of the partnership,

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and not directly required of the partners by reason of their being such. Smith's Mercantile Law, p. 61, note; *Lewis v. Moffett*, *supra*. The facts in this case fail to bring it within these principles.

SHERWOOD, C. J.—Plaintiff brought suit in 1875 against defendant for dissolution of the partnership existing between them, under the name and style of Bachmann & Co., formed in 1866, and also for an account to be had and taken.

A referee being appointed, took an account and made report, which was approved, except in one particular, which was the allowance rendered of compensation to the defendant for services to the firm of which he was a member, there being no articles of co-partnership, and no written or express agreement for the allowance of such compensation, and as is agreed, the correctness of this ruling is the only point to be determined.

The chief purpose of the partnership was the growth of grapes and the manufacture of wine. There was nothing definite agreed upon at the time of the formation of the partnership, only that a certain out-lot containing some forty acres, was to be purchased for partnership purposes by Cramer, and a deed to the undivided half thereof was to be made by him to Bachmann. The amount thus paid Cramer for Bachmann's share of the lot was refunded to him out of the profits realized.

It is quite evident, from the testimony, that Bachmann was looked to and relied on to accomplish the object which induced the formation of the partnership. Under his skilled labor and superintendence a dwelling house, wine cellar, stable and outhouses have been built, and a large portion of "a rough bare ridge, full of stumps," has been transformed into a fruitful vineyard, and an extensive and various orchard. Bachmann continued to labor on the place until 1870, adding to its value every year by labor and capital, when becoming disgusted with the failure of

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Cramer to convey to him the undivided half of the out-lot as he had agreed, he sent the key of the wine cellar to Cramer and made preparations to return to St. Louis from whence he, at the request of Cramer, had come. The latter ascertaining that Bachmann was in earnest, came to him, returned the key of the wine cellar, made him a deed as he had promised four years before, agreed to make a contract with him looking to his compensation for former as well as future services, and handed him an agreement known in the record as "exhibit E," to sign, which writing gave recognition to the idea that Bachmann was entitled to remuneration for both prior and subsequent labors in the interest of the firm. This agreement Bachmann refused to sign, because not regarding the compensation therein specified sufficient, but returned again to his labors, in which he continued until the present proceeding resulted in a decree for dissolution.

There can be no dispute as to the general prevalence of the rule invoked by plaintiff, that a partner is not entitled to remuneration for his services rendered the firm, unless rendered under an express agreement for recompense. Story on Part., § 182, and cases cited; Parsons on Con., § 203, and cases cited; *Barnett v. Russell*, 34 Mo. 524.

But this rule, though of general, is not of universal application. Like all general rules, it has its exceptions, exceptions as much founded in wisdom as the rule which the exceptions thereto prove. Thus, a partner is entitled to reward for his services, if it can be clearly implied from the course of dealing which the partnership adopts, or other circumstances of equivalent force. Parson on Con., *supra*; *Bradford v. Kimberly*, 3 Johns. Ch. 431; Marsh's Appeal, 69 Pa. St. 30. We regard the present instance as affording illustration of justifiable departure from the general rule. The proffered agreement of Cramer to Bachmann, though unsigned by the latter, gives, as before stated, evident indication of the fact that Cramer recognized the value of Bachmann's services, past as well as

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future, and was willing to compensate him therefor; the first section of that agreement reciting that "Hermann Bachmann promises to devote his whole time and care and ability to the growth of grapes and such other products which may be grown upon the above described lot, and to promote the prosperity of the business. For this, his *individual personal labor and pains*, he is to *receive* the following *compensation*, out of the net profits, before the same is to be divided between both parties; for his labor before the 1st day of January, 1869, \$100; for his labor from the 1st day of January, 1869, to the 1st day of January, 1870, the sum of \$400; and for each year thereafter, the sum of \$500," and the second section of that instrument reciting that Cramer "promises to do all in his power to promote and further the said business; to keep and manage the books, as also to manage and attend to all the financial business, and to procure all the necessary materials and utensils to carry on the business; for this, to him, allotted labor and pains, he hereby renounces any claim for pay or compensation." In the one section Cramer promises to pay for Bachmann's services; in the other he renounces all claim of pay for himself.

The controlling question in cases of this sort, is one of intention, and the intention in the case at bar, and the reason for forming it, are made more conspicuously manifest when it is remembered that the time of Cramer was almost exclusively occupied in an independent business of his own; that he was totally unfamiliar with the grape culture and the processes of wine making, while Bachmann was thoroughly familiar with all such matters in their numerous details. And we regard it as not at all improper to consider the circumstances by which the parties were surrounded, and their relative situations towards each other in the endeavor to ascertain whether compensation should be equitably implied for the services performed and to be performed by Bachmann. If this position be correct, and we think it well established by the authorities just cited,

## The State v. Mahly.

then it does not signify that the agreement tendered to Bachmann remained unexecuted; the only importance which that instrument, in its present condition possesses, is as an evidence of the intention which prompted its tender to him. For these reasons, we are inclined to the opinion that the report of the referee should not have been modified on the point of compensation. As a matter of course the amount thereof should be the reasonable value of the services rendered, when considered in connection with and reference to the fact that the labor of Bachmann was constantly making the place on which it was performed more valuable, and in so far as it did this, he was entitled to be the recipient of one-half the benefits arising therefrom.

Ordering the court below to open the evidence now before us in this record, adjust the rights of the respective parties in an equitable manner and conformable to this opinion, we reverse the judgment and remand the cause. All concur.

REVERSED.

THE STATE V. MAHLY, *Appellant*.

1. **Homicide: CRUEL TREATMENT: INSTRUCTIONS.** Where the defendant was indicted for the murder of his step-daughter, a girl three years of age, and the evidence showed a continual course of brutal treatment on his part, extending through a period of several months, resulting in the death of the girl from bruises inflicted by defendant; *Held*, that an instruction that the jury might convict of murder in the second degree, was erroneous, as the evidence, if believed by the jury, presented a clear case of murder in the first degree.

**The Tendency of the Trial Courts** to encourage the sentimentalism of jurors who shrink from convicting of a capital crime, by giving them instructions which enable them to convict of a lower crime which the evidence does not sustain, condemned.

2. **Conduct of Trial: ARGUMENT FOR STATE: IMPROPER REMARKS.** The prosecuting attorney, in his closing argument to the jury, in



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The State v. Mahly.

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referring to the evidence of defendant, who had testified in his own behalf, said: "It was incumbent on him to show how these things were. Did he tell us how she was hurt? It was incumbent on him to prove how she was hurt," and, also, "The preponderance of testimony was in favor of conviction and against the defendant, and upon such evidence they must convict." *Held*, error for which the judgment should be reversed.

**It is not the office** of prosecuting attorneys to declare the law to the jury.

3. **Evidence:** PRIOR ACTS. The conduct of defendant toward the deceased, prior to the time of the commission of the murder, *Held*, admissible in evidence.

*Appeal from Miller Circuit Court.*—HON. G. W. MILLER, Judge.

Indictment for murder in the first degree for the killing of one Barbara Citawatca, the defendant's step-daughter.

At the request of the State the court gave, among others, the following instruction: "The jury are instructed that murder in the second degree is the killing of a human being intentionally, unlawfully, willfully and maliciously; that is, it is the intentional, willful and malicious killing of a human being upon a sudden heat of passion, without previous deliberation or premeditation. If, therefore, the jury believe from the evidence in this case that the defendant caused the death of Barbara Citawatca, by any of the means enumerated in either count of the indictment, intentionally, unlawfully, willfully and maliciously, and in a sudden heat of passion, then the jury will find the defendant guilty of murder in the second degree, and assess his punishment," &c. The defendant was found guilty of murder in the second degree. Motion for new trial and in arrest overruled. Defendant appeals.

*J. L. Smith*, Attorney-General, for the State.

The instruction defining murder in the second degree is in harmony with the repeated decisions of this court.

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*State v. Lane*, 64 Mo. 319; *State v. Wieners*, 66 Mo. 13. As to the right of the prosecuting attorney to comment on the testimony of defendant in his own behalf, see *State v. Harrington*, 5 Cent. Law Jour. 154; *Stover v. People*, 56 N. Y. 315; *Cooley's Con. Lim.*, 317 n.

*Lay & Belch* and *Owens & Wood* for appellant.

HENRY, J.—The defendant was indicted for the murder of Barbara Citawatca, his step-daughter, a child about three years of age. He was found guilty of murder in the second degree, and sentenced to imprisonment in the penitentiary for a term of twenty-one years, and has appealed to this court from the judgment.

The evidence for the State consisted of threats made by the defendant against Barbara, and of a course of the most brutal treatment of the child by the defendant, extending through a period of several months. Finally, on the morning of October 17th, 1876, Barbara was found lying on the hearth dead, with evidences on her body that her death was occasioned by burning. There was evidence tending to prove that defendant was guilty of murdering the child.

If the witnesses for the State testified to the truth, he was guilty of a willful, malicious, premeditated and deliberate homicide: cruel treatment: instructions. There is not in the record a scintilla of evidence to authorize an instruction to the jury in regard to any crime except that of murder in the first degree.

The principal witness for the State, Jacinsky, testified to having seen defendant, on several occasions, hold the child in a perfectly nude state before a strong fire, until its skin was burnt red, and she writhed in her torture like a worm; and this in his presence, and in the presence of Barbara's mother, without so much as a word of remonstrance from either; that he had seen the defendant kick the child, beat her with sticks and throw her out of the house, and that, on one occasion, her nose was broken by the

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fall; this, too, in the presence of the mother. Shortly after the child was buried, the body was disinterred for examination, in consequence of rumors that Barbara had been murdered by the defendant; and yet the defendant remained quietly on his farm, living in harmony with his wife, the mother of Barbara, for twelve months before any steps were taken to bring him to justice for perpetrating so foul and unnatural a murder. We will not say what credit the jury should have given to the testimony of Jacinsky. That is not our province, but in considering the case we may say that the evidence of the witness as to the conduct of the defendant, in connection with the conduct of the witness and Mrs. Mahly, Barbara's mother, as testified to by him, presents a shocking case of depravity in the defendant, and as singular an indifference to its exhibition by Jacinsky and Mrs. Mahly, as is to be found in the records of crime. According to his testimony, the child was starved, flogged, kicked, roasted by the fire day after day for months, and finally murdered by the incarnate fiend, who was the husband of its mother; and yet the court instructed the jury that they might, and the jury did, find that he was only guilty of murder in the second degree. If he killed the child under the circumstances detailed by Jacinsky, human language is inadequate to characterize the atrocity of the crime; and which, among the horrible details, the court regarded as authorizing an instruction as to murder in the second degree, we cannot conjecture. Courts should not humor or encourage the sentimentalism of jurors, who shrink from finding an accused guilty of the highest crime of which the evidence proves him guilty, by giving instructions authorizing them to find him guilty of a lower grade of which there is no proof of his guilt. If they have a reasonable doubt of his guilt of the only crime which the evidence tends to prove, they should acquit, and not compromise with that doubt by finding him guilty of a lower grade of offense. Instructions in regard to the lower grades, not warranted by the evidence, operate as

persuasives to juries to convict of one of those grades when they should convict the accused of the highest, or acquit him altogether. The court erred in giving the instruction defining murder in the second degree, because there was no evidence to support it. *State v. Schoenwald*, 31 Mo. 152; *State v. Starr*, 38 Mo. 269; *State v. Alexander*, 66 Mo. 148.

Another complaint made by appellant is, that the court permitted the prosecuting attorney, in his closing argument to the jury, to say: "Mahly was on the stand, why did he not tell us how the child was burned? It was incumbent on him to show how these things were. Did he tell us how she was hurt? It was incumbent on him to prove how she was hurt. The defendant was there, master of his own house, and it was incumbent on him to show that he did not inflict the burns." Again he said to the jury in that closing argument: "The preponderance of testimony was in favor of conviction and against the defendant, and upon such evidence they (the jury) must convict." Every one of these declarations was a gross misrepresentation of the law, and such conduct on the part of the prosecuting attorney has so often been condemned by this court, that the hope was indulged that the admonitions given would be heeded. It is not for prosecuting attorneys to declare the law to the jury. That is the duty of the court, and the State's attorney is as much bound by the law as declared by the court as are the jury and the accused. The court declared the law, but the prosecuting attorney, not satisfied with the instructions given by the court, made declarations of law to the jury in conflict with those given by the court, and manifestly and palpably erroneous. Can we say that the prisoner was not prejudiced by this conduct of the State's attorney? If he knew the law and made these declarations to the jury in order to procure a conviction, his conduct was very reprehensible. If he knew no better, he should have accepted the law as given by the court.

2 CONDUCT OF  
TRIAL: argument  
for State: im-  
proper remarks.

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The State *ex rel.* Halpin v. Powers.

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Persons accused of crime must be fairly tried, and when so tried, we shall not interfere to prevent them from being punished; but it is not only the duty of this court, but every officer of the State who has duties to perform in regard to the trial of persons accused of crimes, to see that they have a fair and impartial trial. The circuit court should have rebuked the prosecuting attorney and told the jury that the law was not as the attorney declared it to be, and for not having done so, the judgment should be reversed.

It was not error to permit the State to prove the conduct of the defendant toward the child, prior to the time of the commission of the murder, as alleged in the indictment. It was admissible to show malice, premeditation and deliberation; malice may be proved by acts as well as by threats. All concurring, the judgment is reversed and the cause remanded.

3. EVIDENCE: prior acts.

REVERSED.

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THE STATE *ex rel.* HALPIN V. POWERS.

1. **Certiorari:** PETITION: PLEADING. A petition for a *certiorari* in the absence of a formal assignment of errors in the record sought to be reviewed, may be regarded as in the nature of an assignment of errors, and to this extent will be treated as a pleading in the cause, but the court cannot be called upon to consider any question raised by the petition unless it is presented by the record of the inferior tribunal.
2. **Taxation:** ANNUAL ASSESSMENT. Under the charter of the city and the legislation of the State, *annual* assessments of real estate in the city of St. Louis are proper.

*Appeal from St. Louis Court of Appeals.*

Proceeding by *certiorari* to bring up the record of the board of equalization of the city of St. Louis. The petition alleged that in 1876, certain described real estate of relator, in said city, was valued for taxation at a specific sum; that under the law of this State said real estate was

liable to be assessed once in two years only, and that being legally and properly assessed in 1876, it was not again subject to assessment for taxes till the year 1878, yet, notwithstanding this fact, the assessor of the city of St. Louis did, without any authority of law whatever, list, assess and return the said real estate in the year 1877, for the basis of taxation in the year 1878, and the taxes for 1878 have been extended on the assessment so made in 1877, and a higher valuation is placed on the same than was placed thereon in the assessment of 1876, and the relator appealed from the said assessment of 1877, to the board of equalization of the city of St. Louis, whose duty it was by law to rectify and correct all mistakes, &c., and said board reduced to some extent the illegal and unauthorized assessment of 1877, but left the same above the assessment of 1876, and refused to restore it to the assessment of the latter year, &c., wherefore a writ of *certiorari* is prayed, commanding respondents to return into this court the proceedings aforesaid, &c.

The respondents duly made a return and answer setting forth their powers under the law, and the nature of the appeal of relator to them, and that it did not involve the question as to the validity of the annual assessment of real estate in the city of St. Louis, nor was such question presented to them, nor did they decide such question, nor have any power so to do, and a copy of the record of respondents' action on relator's appeal was incorporated in the return, showing the only question presented by said appeal and determined by respondents to have been the question of the cash value of relator's said real estate upon August 1st, 1877, and upon which question relief was afforded to relator by respondents, but not to the extent demanded by him.

The relator demurred to the return on the ground that, under the constitution and laws of this State, there could be no assessment of real estate in St. Louis in 1877.



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The State ex rel. Halpin v. Powers.

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*R. F. Wingate and Wagner, Dyer & Emmons* for relator.

*Certiorari* brings up the whole record, and the court will pass upon the validity of the law under which respondents acted. *Milwaukee Town Co., v. Schubal*, 20 Wis. 594; *State, &c., v. St. Louis Co.*, 47 Mo. 594. The assessment was illegal.

*J. L. Smith*, Attorney-General, and *Leverett Bell* for respondents.

The question whether real estate in the city of St. Louis can be annually valued for the purposes of taxation, does not arise upon this record, because this question was not before respondents nor decided by them; therefore cannot, in this proceeding, review it. *Hannibal, &c., R. R. Co. v. Morton*, 27 Mo. 317; *State ex rel. Lathrop v. Dowling*, 50 Mo. 134; *Rogers v. County Court of Clinton Co.*, 60 Mo. 101; *Hannibal, &c., R. R. Co. v. State Board of Equal.*, 64 Mo. 294. In any event, however, under the laws of this State, the assessment, as made, was proper. The action of the officers will not be set aside if the question is one of doubt. *Cooley's Con. Lim.*, \*68; *Union Ins. Co. v. Hoge*, 21 How. 35, 66; *State v. Mayhew*, 2 Gill (Md.) 487, 497; *Moers v. Reading*, 21 Pa. St. 188, 201; *U. S. v. Gilmore*, 8 Wall. 330; *Lafayette R. R. v. Geiger* 34 Ind. 185, 203.

HOUGH, J.—The assessor in the city of St. Louis assessed the petitioner's real estate in the year 1877 for the taxes of 1878. On appeal to the board of equalization of the city of St. Louis, the petitioner sought a reduction of the valuation, because, as he alleged, it was greater than that fixed upon it in former years, and greater than its actual cash value. The valuation was reduced ten per cent. The petitioner now brings this assessment before us, and alleges that the same is illegal and void; that under the law real estate can only be assessed biennially, that the valuation of the petitioner's property in 1876, the time fixed by

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law for the biennial assessment, should have been adopted as the basis of taxation for 1877, and that said valuation could not be changed by the board of equalization.

In a proceeding by *certiorari* in this court, the petition for the writ may be regarded as in the nature of an assignment of errors on the record sought to be reviewed, in the absence of any more formal assignment of errors after the record is returned to this court. Further than this the petition is not to be viewed as a pleading in the cause. The record of the inferior tribunal is to be examined by us just as it would be, if it could be and were brought before us by a writ of error or an appeal. The record brought here may be amended, as in other cases, by the stipulation of the parties, but no issues of law or fact are to be made by the petition or writ, and return, to be tried by us, as in proceedings by *mandamus* or *quo warranto*. *State ex rel. Lathrop v. Dowling*, 50 Mo. 134.

The only question is, is there error in the record of the inferior tribunal brought before us by the writ? As the assessment record returned in the present proceeding does not show what the valuation of the petitioner's property was in the year 1876, the year in which it is claimed that the biennial assessment is, by law, required to be made elsewhere in the State, it does not appear that the petitioner has been damaged, and we might, therefore, decline to interfere with the action of the board of equalization on that ground; but as the question sought to be presented has been stated in argument to be one of great importance to the State, as well as the tax-payers in the city of St. Louis, we will proceed to inquire whether annual assessments of real estate in the city of St. Louis are allowed by law.

The 20th section of article 9 of the constitution, which provided for the separation of the city from the county, authorized the people of the city to adopt a charter for their government which should be in harmony with and subject to the constitution and

1. CERTIORARI: petition: pleading.  
2. TAXATION: annual assessment.

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laws of Missouri, and should take the place of and supersede the charter of St. Louis and all amendments thereof. The 23rd section of the same article provides that the city of St. Louis shall collect the State revenue in the same manner as if it were a county. As the city government, authorized by the constitution for the city of St. Louis, is entirely different in its organization from that of the counties, and as the duty of collecting the State revenue which devolved upon the county of St. Louis under the general law, was thereafter to be performed by the city of St. Louis, it became necessary to provide in the charter the requisite municipal agencies for the performance of that duty. Proper officers were to be designated, the mode of their selection prescribed, and the duties which were previously performed by the officials designated in the general law were, by express enactment, to be imposed upon them. The 1st section in the city charter on this subject declares that the city of St. Louis shall be assessed in accordance with the general law. Subsequent provisions require the annual assessment of real property within the city, and create a city board of equalization, which is required to meet annually, and is authorized to adjust, correct and equalize the valuation of real property so assessed, and to determine, as far as possible, whether such property has been assessed at its true cash value, and in just proportion to the assessed value of other property in the city similarly situated, and to increase or diminish the assessment accordingly. These requirements are substantially the same as those of the general revenue law relating to St. Louis county, in force at the time of the adoption of the scheme and charter, and as they clearly contemplate the annual valuation of real property in St. Louis, it is contended that they are not in harmony with the 48th section of the general law, and are, therefore, inoperative. Section 48 is as follows: "Real estate shall be assessed at the assessment which shall commence on the 1st day of August, 1872, and shall only be required to be assessed every

two years thereafter. Each assessment of real estate so made shall be the basis of taxation on the same for the two years next succeeding." This section first made its appearance in its present shape in the revenue law passed March 30th, 1872.

The revenue law as contained in the general statutes of 1865, required the county boards of equalization, including the board of equalization for the county of St. Louis, to meet annually, and, at such meetings they were authorized to increase or diminish the assessment of real property so as to make it conform to its true value. Gen. Stat., p. 97, §§ 13, 14, 15; p. 108, § 65. In the year 1870 an act was passed, not as an amendment, in terms, of any existing law, but as an independent statute, entitled, "An act in relation to the assessment and collection of revenue on real estate, and providing that taxes on real estate shall be a lien on the same, and for the sale and enforcement of such liens." The first section of that act is as follows: "The assessment of real estate, made for the year 1870, shall be the assessment thereof until the 1st Monday in July, 1871, between which last named time and the 1st day of October next thereafter, and in like time every two years thereafter, all real estate subject to taxation shall be assessed and listed numerically, as far as the same can be done as now provided by law; but nothing herein contained shall be so construed as to affect the right of any board of equalization, in pursuance of law, to increase or diminish the aggregate of such assessment, or the assessment of any tract or lot, or of any county court or other tribunal by law thereto authorized, to add to such lists all tracts and lots of land not assessed, or to strike from such list any tract or lot improperly assessed. Acts 1870, p. 114. As this statute was an independent enactment, it might have been thought, but for the qualification contained in the foregoing section, that it was the purpose of the law to deprive county boards of equalization of all power to interfere in any manner with the biennial assess-

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ments therein provided for, and hence out of abundant caution their right to annually revise such assessments was expressly recognized. In 1872 the entire revenue law of the State, comprising at that time many detached and fragmentary enactments, was revised and re-enacted in a single statute, containing section 48 above quoted, and retaining the provisions of the general statute of 1865, authorizing the county boards of equalization, and the board of equalization of the county of St. Louis, to increase and diminish the assessment of real property at their annual meetings. Acts 1872, p. 87, §§ 14, 15, 16; p. 99, § 80 (79). The retention of these sections, defining the powers of the county board of equalization, demonstrates the purpose of the Legislature to leave the law, in this particular, just as it stood after the passage of the first section of the act of 1870, and being embodied in the same act with section 48, there was no necessity for adding to said section the qualification annexed to its prototype in section 1 of the act of 1870. They are to be construed together, and force and effect are to be given to both. So that under the act of 1872 the biennial assessment was subject to revision by the county boards of equalization, not only during the year for which it was made, but in the succeeding year also. By the act of April 28th, 1877, a most material change was wrought in the law relating to the assessment of real property. By the 3rd section of that act section 28 of the act of March 30th, 1872, was so amended as to require every tax-payer to furnish annually to the assessor, in addition to his personal property, a list of all his real estate and its value. Session acts 1877, p. 377, § 3; and by the 5th section of said act, which amends section 31 of the act of 1872, the person making such list is required to make oath that it contains a true statement of all property owned by him and made taxable by the laws of the State, together with its value. Before the passage of the act of 1877, the oath required by section 31 of the act of 1872 was, that the list returned was a true list only of all per-

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sonal property owned by the person making the same. It would seem, therefore, that the act of 1877, by requiring an annual return of real property and its value to be made to the assessor, accomplished the virtual repeal of section 48, providing for biennial assessments. This being so, the petitioner's property was properly assessed in the year 1877 for the taxes of 1878. As the construction here given to the general law has not perhaps been formally carried out in many portions of the State, it may be well in this connection to call attention to the 53rd section of the act of 1872, which is as follows: "No assessment of property or charges for taxes therein shall be considered illegal on account of any informality in making the assessment or in the tax list, or on account of the assessments not being made or completed within the time required by law."

Perceiving no error in the action of the board of equalization, the relief sought by the petitioner will be denied, and the writ dismissed. All concur.

WRIT DENIED.

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PARTON V. McADOO, *Appellant*.

**Practice, Civil:** ERRONEOUS INSTRUCTIONS, NO GROUND FOR REVERSAL, WHEN. An instruction which is objectionable, because it ignores an issue in the case, is no ground for reversal, where all the other instructions directly and fairly present such issue, and the jury have not been misled thereby.

*Appeal from Greene Circuit Court.*—HON. W. F. GEIGER,  
Judge.

*Patterson & Barker* for appellant.

*John S. & James R. Waddill* for respondent.



HENRY, J.—Plaintiff, Parton, sued defendant on an account for \$92.50, balance alleged to be due on a bill of lumber sold by plaintiff to defendant.

Plaintiff owned a tract of land in Greene county, and his brother and one Martindale placed a saw-mill on the land, and became indebted to plaintiff for logs furnished, money advanced for them, &c, and sawed lumber for them on account of such indebtedness. The defendant had acted as agent for Martindale & Parton in selling their lumber, but he complained, in presence of plaintiff on one occasion, that they did not furnish promptly orders for lumber which he sent them, and plaintiff told him if he would get good bills he would fill them. The evidence is contradictory as to whether defendant accepted the proposition. A short time after the conversation, defendant made an order in writing for 10,000 feet, signed by himself but addressed to no one, and handed to a teamster employed by Martindale & Parton to haul lumber, who delivered it to plaintiff instead of Martindale & Parton.

The lumber was delivered by plaintiff on the order, but not until a portion of it was delivered, was defendant aware that plaintiff was furnishing it. Defendant had a demand against Martindale & Parton for commissions and money paid for them, and insisted upon retaining a sufficient amount of the money due for the lumber furnished by plaintiff to pay his claim against Martindale & Parton.

The court gave several instructions for plaintiff, and as many for defendant. The second given for plaintiff, standing alone, was objectionable. It declared that "the question to consider was, whether plaintiff furnished the lumber and the defendant received it, knowing it to be plaintiff's lumber, if he received the proceeds and failed to account to plaintiff." This ignores the question of agency. If defendant was acting as agent for Martindale & Parton, and plaintiff filled the bill for them, defendant was not liable to plaintiff. But all the other instructions,

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as well for plaintiff as defendant, distinctly presented that issue to the jury. The fourth for plaintiff declared: "That if the defendant received the lumber and the proceeds, though at the beginning he may have believed the lumber was from Martindale & Parton, yet, if at any time during the delivery he was informed that plaintiff was delivering the lumber, and that he was neither partner nor agent of Martindale & Parton, and defendant still continued to receive the same after such notice, he is chargeable with all received after such notice." In harmony with this, were all the instructions given for defendant, and we cannot think it possible that the jury were misled by the second instruction given for plaintiff. It is a very indefinite, and by no means lucid instruction, and a jury would be very apt to look to others for guidance rather than to this.

The verdict was for plaintiff, and we see no good reason for disturbing it. Judgment affirmed. All con-  
concur.

AFFIRMED.

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HICKS *et al.* v. HANNIBAL & ST. JOSEPH RAILROAD COMPANY,  
*Appellant.*

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1. **Railroads** : DAMAGES : EVIDENCE, NOT RELEVANT TO THE ISSUES. In an action for damages against a railroad company for ejecting a passenger from a train at a station short of that for which she had procured a ticket, evidence offered by the defendant to prove a regulation of the company forbidding such train to stop at the station to which the ticket had been purchased, when such regulation was not set up in the answer, was properly rejected as not relevant under the issues made by the pleadings.
2. — : — : —, THE REJECTION OF WHICH CAUSES NO PREJUDICE. The rejection of cumulative evidence, even if in strictness receivable, is no ground of reversal, where it appears that the complainant was not prejudiced thereby.
3. — : —, PUNITIVE : INSTRUCTIONS AS TO, JUSTIFIED BY THE EVIDENCE. Plaintiff testified that after the purchase of her ticket from Kansas City to Utica, she exhibited it to the baggage master who

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checked her baggage to Utica, and it was put upon the train by the agents of the company, who assisted her in getting into a car of the same train; that upon the arrival of the train at a station some miles short of Utica, upon her refusal to get off at that station as requested by the conductor, he used profane and threatening language to her, and thereupon sent a brakeman, who took her little girl, thereby compelling her to follow with her baby, and leave the train at nine o'clock at night; that she was compelled to remain, in the dark and exposed to the cold, for half an hour until the freight train came along, and was made sick by the exposure; *Held*, that upon this evidence the trial court was justified in refusing an instruction asked by the defendant, that the plaintiff could not recover punitive, but only actual damages.

4. **Railroads:** COUNTIES IN WHICH SUITS AGAINST MAY BE BROUGHT. Under the statute, (1 Wag. Stat., § 28, p. 294,) suits may be brought against railroad companies in any county where such companies have or usually keep an office or agent for the transaction of their usual or customary business.
5. ———: INSTRUCTIONS. Instructions, with no support in the evidence, are properly refused.

*Appeal from Livingston Circuit Court.*—HON. E. J. BROADBUSH, Judge.

The plaintiff asked the following instructions, which were given by the court:

1. If the jury find from the evidence that the plaintiff, Mrs. Hicks, purchased of defendant a ticket for herself and two infant children for the purpose of being carried as a passenger over defendant's railroad from Kansas City to Utica, Missouri, and that defendant then and there received Mrs. Hicks with her said children on its train as a passenger aforesaid, and that defendant, by its conductor, servants or employees, compelled Mrs. Hicks and her children to leave said train at Breckenridge, Missouri, and before reaching her destination, then such act on the part of defendant was unlawful, and the jury must find for plaintiffs.

2. If the jury find for plaintiffs, they will, in estimating the damages, take into consideration all the facts and

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circumstances of the case given in evidence, and give such amount as they may consider an adequate recompense for the injury sustained by plaintiff, Mrs. Hicks; and if the jury find from the evidence that Mrs. Hicks was put off the train on which she was riding before reaching Utica, Missouri, by defendant, its servants, agents or employees, and that the same was done in a willful, wanton or reckless manner, and against the will of Mrs. Hicks, then the jury may give, in addition to what they may consider an adequate recompense for the injury aforesaid, such other damages as may serve for a wholesome example to others in like cases.

3. The defendant having received Sarah A. Hicks, one of the plaintiffs, and her two infant children, into their passenger cars at Kansas City, Missouri, she first having purchased her ticket entitling her to be carried from said Kansas City, Missouri, to Utica, Missouri, were bound to so carry her in said passenger car as a passenger.

4. If the plaintiff, Sarah A. Hicks, and her two infant children, were ejected from defendant's passenger car, where she and her children had a right to be, at Breckenridge, Mo., while being conveyed by defendant from Kansas City, Missouri, to Utica, Missouri, on or about the 9th day of September, 1874, she and her children not being permitted to travel further on said passenger train, then the jury must find for plaintiffs.

5. The unlawful ejection of plaintiff, Sarah A. Hicks, from defendant's passenger car, where she as a passenger had a right to be, any space of time, entitles her to a judgment.

6. The jury are instructed that the plaintiff's right to recover a judgment against defendant is not affected by the length of time she had to wait for another train.

The defendant asked the following instructions, of which the court gave the first and second, and refused the third, fourth, fifth and sixth:

1. The jury are instructed that although they may

believe from the evidence that plaintiff did purchase a ticket from Kansas City to Utica, Missouri, and that at Breckenridge the plaintiff was requested and did take another train at defendant's instance, yet the plaintiff cannot recover unless the jury believe by said acts of defendant the plaintiff, Sarah Ann, was actually damaged.

2. Before the jury can find for plaintiff a greater sum than she was actually damaged, they must find that the defendant used physical force, or such threats of violence as to put the plaintiff in fear of violence to her person, or the persons of her children, if she did not abandon the passenger car on which she was riding and take a freight train.

3. In this suit the plaintiff is not entitled to punitive damages, or smart money, and the jury can only find actual damages sustained.

4. Unless the jury believed that the plaintiff received actual damage at the hands of defendant, in Livingston county, they must find for defendant.

5. Although the jury may believe from the evidence that the plaintiff, Sarah, was a passenger on defendant's railroad, and held a ticket from Kansas City to Utica, and that she was compelled to get off the passenger train at Breckenridge and take a freight train, yet they cannot find for plaintiff unless they believe from the evidence that plaintiff was actually damaged, and if they find for plaintiff they can do so only in the actual amount plaintiff was damaged.

6. If the jury believe from the evidence that Utica station was not a junction of another railroad with that of defendant's road, then defendant had a right to make regulations as to what trains should stop at said Utica station, and if it was one of the regulations of defendant that train No. 4 did not stop at said Utica station, then defendant had a right to transfer plaintiff to some train that did stop at said station, and if the jury believe from the evidence that plaintiff was transferred to another train and carried

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to said Utica station, without unreasonable delay, they will find for the defendant.

*Geo. W. Easley* for appellant.

The sale of the ticket was not a contract to carry on any particular train, but a contract to carry within a reasonable time in accordance with defendant's reasonable regulations. It was defendant's duty to the public to run its trains according to its announced regulations; and it was the duty of Mrs. Hicks to inform herself when, and upon what train she could go to Utica in accordance with these regulations, and if she failed to do so, or made a mistake, she was without remedy. 2 Redfield on Ry., (5 Ed.) p. 283, § 5; Pierce's Am. R. R. Law, 489; *Pittsburgh, &c., Ry. Co. v. Nuzum*, 50 Ind. 141; *Cheney v. Boston & Maine R. R. Co.*, 11 Met. 121; *Boston & Lowell R. R. Co. v. Proctor*, 1 Allen 267; *Johnson v. Concord R. R. Co.*, 46 N. H. 213; *Southern R. R. Co. v. Kendrick*, 40 Miss. 374.

2. A conductor cannot be guilty of malice and wantonness when he is, in a proper manner, carrying out the regulations that his company has rightfully made. *Goetz v. H. & St. Jo. R. R. Co.*, 50 Mo. 472; *Kennedy v. North Mo. R. R. Co.*, 36 Mo. 364; *Philadelphia, &c., R. R. Co., v. Quigley*, 21 How. 202.

3. By plaintiff's fifth and sixth instructions the case was made to turn upon the loss of time by the wife. For none of these causes could the wife recover. These damages pertained to the husband. *Daly v. Houston*, 58 Mo. 361; *Smith v. City of St. Joseph*, 55 Mo. 456; *Barnes v. Martin*, 15 Wis. 240; Hill on Torts, (2 Ed.) p. 694; 1 Bishop on Married Women, § 913; Redfield on Carriers, §§ 409, 410; Pomeroy on Remedies, § 242.

*W. N. Norville* and *L. T. Collier* for respondent.

1. The suit was brought in the proper county, and the court below committed no error in overruling the motion



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to exclude all evidence under the petition for want of jurisdiction. 1 Wag. Stat., § 28, p. 294; *Dixon v. H. & St. Jo. R. R. Co.*, 31 Mo. 410; *Slavens v. South P. R. R. Co.*, 51 Mo. 308; *Mikel v. St. Louis, K. C. & N. R. R. Co.*, 54 Mo. 145.

NORTON, J.—This suit was instituted in the Livingston county circuit court for damages. The petition alleged the incorporation of defendant, and that, on the 9th day of September, 1874, Mrs. Sarah Hicks, wife of her co-plaintiff, F. M. Hicks, and her two infant children, were received by defendant, into its passenger train, at Kansas City, Missouri, to be carried to Utica, Missouri, she having purchased a ticket for passage between said points; that on the arrival of said train at Breckenridge, a station about ten miles west of Utica, the defendant, by its conductor and agents, by force, and against the will, consent and protest of Mrs. Hicks, ejected and put her out of said passenger train at about the hour of ten o'clock at night, where she remained exposed to the cold for about one hour, when a freight train arrived on which she took passage and was carried to Utica; that in consequence thereof, she and her children were greatly exposed and made sick, and that she had sustained damage in the sum of \$1,000. Except as to the incorporation of defendant, the answer contained a specific denial of the allegations of the petition. On a trial of the cause plaintiffs obtained judgment for \$700—\$200 of which was remitted—and from this judgment defendant has appealed, and assigns for error the action of the court in refusing to receive legal evidence, and in giving improper and refusing proper instructions.

I. During the progress of the trial defendant asked witness McCoy who was telegraph operator at Utica, what defendant's regulations were as to passenger train No. 4 (which was the train on which Mrs. Hicks took passage) stopping at Utica station? The court refused to allow the witness to answer.

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It will be observed that the answer of defendant does not set up any regulation of the company requiring said train not to stop at said station. It only traverses the petition and puts in issue the facts therein alleged. The evidence offered was not relevant to any issue made by the pleadings. If defendant intended to rely upon a regulation of the company, showing that the train upon which Mrs. Hicks was a passenger, did not stop at Utica, it should have been pleaded and set up in the answer, so as to have afforded plaintiffs an opportunity of putting it in issue, and preparing to meet it at the trial. No such issue having been tendered in the pleadings, it could not be made in the evidence. *Greene v. Gallagher*, 35 Mo. 226.

Defendant, after showing by the conductor of the freight train, which carried the plaintiff from Breckenridge to Utica, that it left the former place ten minutes behind the passenger, and by McCoy, the agent of defendant at Utica, that it reached the latter place fifteen minutes behind the passenger, offered the register kept by the train dispatcher, for the purpose of showing that the passenger train left Breckenridge at 8:53 p. m., and arrived at Utica at 9:20 p. m., and that the freight left Breckenridge at 8:55 p. m., and arrived at Utica at 9:35 p. m. This evidence the court rejected. As plaintiff's right to recover was not dependent on the length of time she remained at Breckenridge, and as the facts sought to be proven by the register had been fully established by the evidence of the agent at Utica and the conductor of the freight train, the rejection of the evidence even if, in strictness, it was receivable, will not justify a reversal, it not appearing that defendant was prejudiced thereby.

II. The instructions given by the court are applicable to issues made in the pleadings, and are justified by the evidence. Mrs. Hicks, who was examined as a witness, testified that after purchasing her ticket at the office of

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defendant in Kansas City, she exhibited it to the baggage master who checked her baggage to Utica; that it was put on the train in question by defendant's agents, and that they assisted her in getting into the car; that, after the train had left Kansas City the conductor told her he would not stop at Utica, that upon the arrival of the train at Breckenridge, a station some miles distant from Utica, she was requested to get off, which she declined to do, whereupon the conductor used harsh language and swore at her, and said by G—d if you don't get off I will have a man put you off, and thereupon sent a brakeman who took her little girl and she took her baby and basket and followed him; that this occurred about nine o'clock at night, that she remained at Breckenridge in the dark, and exposed to the cold for about one-half hour, when the freight train came along, to get into which she had to walk in the dark with her children the length of thirty cars; that she arrived at Utica between ten and eleven o'clock, and was made sick by the exposure to which she had been subjected. It was also shown by another witness that the passenger train did, in fact, stop at Utica and put off the baggage of Mrs. Hicks, and by another that it stopped because a freight train was in the way. In the estimation of damages the jury were confined by the instructions given for plaintiffs, as well as those given for defendant, to the damage sustained by Mrs. Hicks, and are not, therefore, subject to the objection made by defendant that, under plaintiffs' instruction, the jury were authorized to give damages for the time lost by Mrs. Hicks. The fifth and sixth instructions simply declare that her right to a judgment was not affected by the length of time she was compelled to wait for another train. They did not direct nor authorize a recovery for loss of time, and are not inconsistent with the second instruction given for plaintiff, or the first given for defendant. The suit was prosecuted in favor of the wife, as the meritorious cause of action, to recover for personal injuries and physical suffering sustained by her, and to such recov-

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ery she was confined by the instructions. The husband was but a nominal party, and no recovery was sought by him for injuries to the wife. *Smith v. City of St. Joseph*, 45 Mo. 449, and 55 Mo. 456.

Defendant's third instruction, which asked the court to tell the jury that plaintiff could not recover punitive, 3. ———: but only actual damages, was properly refused. "When malice, violence, oppression or wanton recklessness mingle in the controversy, vindictive damages may be allowed." Kennedy v. North Mo. R. R. Co., 36 Mo. 364. The plaintiff, with two infant children, had intrusted herself to defendant to be carried to her destination. The conductor in violent, unbecoming and insulting language, threatened to eject her from the train, and sent a brakeman to execute the threat, who did execute it by taking one of the children and carrying it off, thus forcing her to follow with her remaining child. There was sufficient evidence to justify the court in not withdrawing from the jury the question of punitive damages.

The fourth instruction was properly refused under the authority of *Dixon v. Hannibal & St. Jo. R. R. Co.*, 31 Mo. 410, and Wag. Stat., § 28, p. 294. 4. RAILROADS: counties in which suits against may be brought.

The sixth of defendant's instructions was properly refused, because there was no evidence to support it, and for the reason hereinbefore given, sustaining the action of the court in not receiving evidence to show the regulation of the company in regard to the stoppage of trains at Utica. We have been cited to the case of *Pittsburgh, &c., Ry. Co. v. Nuzum*, 50 Ind. 141, as authority against the action of the court in giving plaintiff's third, and refusing defendant's sixth instruction. In that case the plaintiff had purchased a ticket from Union City to Sweetser, and the conductor of the train on which he was being carried having refused to stop at Sweetser and let him off, he sued for the injury. The answer of de-

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defendant admitted the facts stated in the petition, and set up, by way of justification, that defendant ran two daily trains from Union City to Sweetser, which stopped at the latter station, and also a through train from Columbus to Chicago which was not allowed to stop at Sweetser, and that it was upon this latter train that plaintiff had taken passage. On the issue thus presented in the answer, it was held that it was the duty of a passenger to inform himself when, where and how he could go or stop, according to the regulations of the company's trains, and that if he made a mistake, which was not induced by the company, he had no remedy. It was also held that when a passenger is induced by the company to take a train which, according to its regulations, does not stop at a particular station, it is the duty of the company to let him off at such station notwithstanding the regulation. Stress was also laid upon the fact, that it was set up in the answer, that the train which plaintiff entered did not stop at Sweetser, and that defendant ran two other daily trains that did stop there.

In the case before us no such issues are presented in the pleadings, and the questions arising in that case do not arise in this. Besides this, if it had been alleged in the answer of defendant that by its regulations, the train upon which Mrs. Hicks entered, did not stop at Utica, her uncontradicted evidence that she was induced to enter the train by defendant's servants, would, under the principle announced in the case of *Pittsburgh, &c., Ry. Co. v. Nuzum, supra*, give her a right of action for any injury sustained by reason of the failure of defendant to stop at said station and let her off. Judgment affirmed, the other judges concurring.

AFFIRMED.

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Payne v. Twyman.

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PAYNE, *Appellant*, v. TWYMAN.

**Husband and Wife:** LAND, ENTRY OF: RESULTING TRUST. Where a husband has entered land in his own name with money belonging to his wife's separate estate, because of a regulation of the land office, it is his duty, although he may be in embarrassed circumstances, to convey such land to a trustee for her benefit.

*Appeal from Cass Circuit Court.*—HON. FOSTER P. WRIGHT,  
Judge.

*R. O. Boggess* for appellant.

*A. Comingo* and *L. E. Carter* for respondents.

SHERWOOD, C. J.—This is an equitable proceeding to set aside a conveyance of land made by George B. Twyman to Wilson, as trustee for the wife of Twyman. The evidence was very conflicting and the court found and decreed for defendants.

After a perusal of the evidence we are not prepared to say that the decree should have been different. The chief point in controversy was whether the land entered was entered with the money of the husband or that of the wife. There was testimony to the effect that there was a marriage contract between Twyman and his wife; that she had a separate estate, derived from that of her father, and the land, the subject of this proceeding, was purchased with money derived from such separate estate, and there was testimony to the contrary effect. There was one circumstance, however, detailed on the hearing of the cause, which may, perhaps, have had no inconsiderable influence on the mind of the court in its final conclusion touching the matter in controversy.

The land in question, some 120 acres, was entered on the 15th day of October, 1855, at the graduation price of fifty cents per acre, making the aggregate sum \$60. The plaintiff had testified that he had gone the security for Twyman on a note to the county to raise money to enter



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the land, but the financial statement of the county for the years 1855, 1856 and 1857, showed this to be an error, and that plaintiff had not thus become the surety of Twyman until a much later period, 1858, long after the entry was made, and then for the sum of \$123. If the money used to enter the land was really that of the wife's separate estate, and Twyman entered the land in his own name, instead of that of his wife, in consequence of some regulation of the land office at Warsaw, it was his clear duty to have transferred the property to a trustee for his wife's benefit, just as he subsequently did do. And although he, at the time of the transfer to the trustee, was embarrassed, this in no manner changed his duty in the premises; a duty which demanded that the trust fund committed to his care should not be diverted from its originally intended purpose; a matter with which his creditors had no imaginable concern.

Viewing the matter in this light, and somewhat deferring to the court below on a subject greatly dependent on the credibility to be attached to the testimony of the witnesses, we have thought best, on the whole record, to affirm the judgment, which is accordingly done. All concur.

AFFIRMED.

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LEMON V. CHANSLOR *et al.*, Appellants.

1. **Common Carrier of Passengers:** HACKMAN, ACTION AGAINST: PETITION NEED NOT AVER LEGAL CONCLUSIONS. In an action for damages for injuries received by plaintiff, in consequence of the unsoundness of a hack used by defendants in transporting persons from a railroad depot in a city to their several destinations therein, where the petition states that defendants were common carriers, and that plaintiff was accepted by them as a passenger, the law implies an agreement on the part of the plaintiff that he shall pay his fare, and an obligation on the part of defendants that he shall be safely carried, and no express contract to that effect need be averred.

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## 2. ———: ———: REPLICATION: DEPARTURE IN PLEADING: ESTOPPEL.

Where the replication averred that the hack, in which plaintiff was being carried, was overloaded, and evidence was offered in support thereof, and objection was made that the petition contained no such averment, and that, therefore, the replication was a departure from the cause of action stated in the petition, and that the evidence was, therefore, incompetent; but it also appeared that the answer averred that the hack was not overloaded, and that plaintiff's motion to strike out this part of the answer had been overruled; *Held*, that if there were a departure in pleading, the defendants, by tendering such an issue in their answer, were responsible for it, and could not be heard to complain of their own act.

## 3. ———: ———: EVIDENCE, WHEN RECEIVABLE IN REBUTTAL. Plaintiff,

in making out his case, offered evidence to prove that he was received as a passenger on defendants' hack, and without any fault of his own received the injuries of which complaint was made. Defendants then offered evidence to show that the hack was sound and well fitted for the service to which it was put, that it was not overloaded, and that the accident by which plaintiff was injured could not have been avoided by any precautions on their part. Plaintiff then offered evidence to rebut that given by defendants, and it was objected that this evidence should have been offered as part of the plaintiff's case, in chief. *Held*, that the evidence was properly received in rebuttal.

## 4. ———: WITNESS, IMPEACHMENT OF. Where defendants attempted to

impeach plaintiff's witness by proving he had said, that if plaintiff recovered in the suit there would be money in it for him; *Held*, there was no error in allowing plaintiff to be recalled, and to state that he had never, directly or indirectly, offered witness any money or reward; that such testimony could not prejudice defendants, as it tended to show that witness' statement was false, and was, therefore, in aid of defendants' object, the impeachment of the witness.

## 5. ———: DUTIES OF: ONUS PROBANDI. It is the duty of carriers of

passengers, as far as they are capable by human care and foresight, to carry safely those whom they take into their coaches, and they are responsible for any, even the slightest, neglect; and when the passenger suffers injury by the breaking down or overturning of the coach, the presumption, *prima facie*, is that it was occasioned by some negligence of the carrier, and the *onus probandi* is upon him to establish that there has been, on his part, no negligence whatever, and that the injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.

## 6. GRATUITOUS PASSENGER. In such case, the fact that the person receiving the injury was a gratuitous passenger, constitutes no defense.

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*Appeal from Saline Circuit Court.*—HON. WM. T. WOOD,  
Judge.

The following instructions were given for plaintiff:

1. If the jury believe from the evidence that on the 3rd day of February, 1874, the defendants, in conjunction with their livery stable, were engaged in the business of running hacks, coaches and omnibuses to and from the Missouri Pacific Railroad to and from the different points in Lexington, for the conveyance of persons for hire, then they were bound to provide safe, staunch and roadworthy conveyances, with careful drivers, so far as human foresight, skill and knowledge and care could provide, and they are responsible for all injuries arising from slight negligence on the part of themselves, their agents or servants; if, therefore, the jury believe from the evidence that on the 3rd day of February, 1874, plaintiff took passage in one of the coaches of defendants, that while the same was being driven at a moderate gait it suddenly broke down by reason of the front axle breaking, or other cause, and that the hack was turned over and the plaintiff injured thereby, then it rests on the defendants to prove to your satisfaction that said hack was safe, sound, roadworthy, not overloaded and carefully driven, and that said axle broke, and said accident arose from and was caused by inevitable accident or defect that could not have been seen, detected or known to defendants, their servants or agents, by the exercise of the utmost skill, knowledge, foresight, care, inspection and examination of said coach by defendants, their agents or servants, and unless the jury so believe they will find for plaintiff.

2. If the jury believe from the evidence that on February 3rd, 1874, the defendants were engaged in the business of transporting passengers from the railroad depot in Lexington to any and all points of said city, and that on said day the plaintiff was received by them, or their agents at said depot to be carried on one of the hacks of defend-

ants, and that while being so transported on said hack plaintiff was injured by reason of the breaking of an axle on said hack, then the burthen of proof rests upon defendants to prove to the satisfaction of the jury that said break-down was caused by inevitable accident and not from any defect, imperfection in the hack, overloading or careless driving, and that by the exercise of the utmost human foresight, knowledge, skill and care, such injury could not have been prevented by defendants, their agents or servants, and unless the jury so believe they will find for the plaintiff.

3. Even though the jury may believe from the evidence that plaintiff did not pay, and did not expect to pay any fare for riding on defendants' hack on the day the break-down occurred, they are instructed that said fact does not affect the issues in this case, and is no defense on the part of defendants, but the jury are instructed, that if they believe from the evidence that plaintiff was the conductor on the express train, that defendants run hacks and busses in connection with the coming in and departing of said trains, that defendants sold tickets on the train, and that plaintiff was in the habit of telegraphing, before arriving at Lexington, notifying defendants of the number of persons on his train, and of the number of conveyances they could expect to find employment to carry; that in consideration of said services so rendered by plaintiff, the defendants allowed him to ride in their conveyances without paying fare therefor, then plaintiff was not a free or gratuitous passenger.

4. Even though the jury may believe from the evidence that on the morning said hack started to the depot the axle and spindles thereof, so far as human foresight, knowledge, care and skill could detect, were sound, safe and roadworthy, yet, if the jury should further believe from the evidence that while said hack was run and used in the business of defendants on said trip, and while the roads were rough and frozen, the said hack was, for the character of the roads, loaded beyond what a safe and prudent

man would have placed on the same, or that from the carelessness of the driver while on said trip in either overloading the hack or in driving said hack on said trip, and that by reason of said load or of the conduct of the driver said hack was broken down and the plaintiff injured, then the jury will find for the plaintiff.

5. If the jury should find for the plaintiff, they will assess the damages at such sum not exceeding \$5,000, as they may think will compensate plaintiff for loss of time, amount paid for medical attendance and all mental and bodily pain and anguish they may believe he has suffered, together with such sum or sums as will compensate plaintiff for any permanent injury or incapacity, they may believe he has sustained by and from such injuries so received.

The following instructions were asked by the defendants, all of which, with the exception of the first and sixth, were given by the court:

1. The jury are instructed that this is a suit brought by plaintiff against defendants for damages for an alleged injury to the knee and leg of plaintiff, charged to have been caused by the recklessness and negligence of defendants in using a hack in their business of carrying passengers to and from the depot of the Missouri Pacific Railroad at Lexington, Missouri, in which plaintiff claims to have been a passenger on the 3rd day of February, 1874, and which hack is charged by plaintiff to have been then and there unsound, unsafe and unfit for use; and plaintiff claims to have been injured by the breaking down of such hack, owing to the unsafe and unsound condition and the negligence of defendants in the using of the same in such unsafe and unsound condition; and unless the jury believe from the evidence that said hack was unsound and unsafe, and that the alleged injury to the leg and knee of plaintiff was caused by the negligence of defendants in using of the same in such unsound and unsafe condition for the transportation of passengers, the jury will find for the defendants.

2. If the jury believe from the evidence that, at the time of the injury complained of by plaintiff, the defendants were the owners and keepers of a livery stable in the city of Lexington, Missouri, and as part of their business ran a hack or hacks, or an omnibus, to and from the depot of the Lexington & Sedalia branch of the Missouri Pacific Railroad, and the business portion of said city, near the City Hotel, and that plaintiff, according to his custom, on the morning of the 3rd day of February, 1874, on the arrival of the train of which he was conductor, at such depot, entered one of the vehicles, to-wit: a hack of defendants, with the passengers, to ride to the business part of said city, near the City Hotel, and that after going a short distance the left spindle of the front axle of such hack suddenly, and without warning to the driver and manager of such hack, broke off at the shoulder thereof, and that plaintiff, who was riding on the front seat with the driver, fell from such hack and was injured in his leg and knee by the falling of the forepart of such hack on his leg; yet if the jury further believe from the evidence that such hack was sound, sufficient, roadworthy and safe, so far as could be seen or known by minute and careful examination, and that the same was drawn by good and sufficient and well trained and gentle horses, with suitable trappings and equipments for such hack and horses, and that the same were driven by an experienced, competent, safe and careful driver, on the usually traveled route, at a moderate rate of speed, and that such hack was not overloaded, and that the breakage of such spindle occurred accidentally and without the fault or negligence of defendants, or their servants or agents, while such hack was being used, managed and driven in a careful, skillful and proper manner, from some cause imperceptible and unknown to defendants, and which the utmost skill, care and diligence could not foresee, then and in such case, defendants are not liable to plaintiff in the suit, and the jury will find for the defendants.

3. Although the jury may believe from the evidence



that plaintiff, on the 3rd day of February, 1874, was injured by the breaking of the left front spindle of a hack of defendants, and the falling of a part of said hack on the leg of plaintiff, in the falling of such hack caused by the breaking of such spindle, yet, if the jury further believe from the evidence that the breaking of such spindle occurred accidentally from some cause or causes, imperceptible and unknown to defendants, and which the utmost skill, foresight and diligence could not prevent, then the defendants are not liable to plaintiff in this suit, and the jury will find for the defendants.

4. The jury are instructed, that if they believe from the evidence that the breaking of the spindle of defendants' hack at the time of the injury complained of by plaintiff, was accidental, and such as human foresight and prudence could not have foreseen or guarded against, or such as did not result from the negligence of defendants or their servants defendants are not liable in this action.

5. The jury are instructed that whatever the injuries received by plaintiff may be, yet, defendants are not liable therefor unless such injuries resulted from the negligence or misconduct of defendants, or their servants, and unless the jury believe from the evidence that such negligence or misconduct existed at the time, they must find for defendants.

6. Although the jury may believe from the evidence that defendants were, at the time of the injury received by plaintiff, engaged in the business of carrying passengers to and from the depot at the city of Lexington, or other place, yet if the jury further believe from the evidence that the injury received by plaintiff was so received whilst traveling in or upon one of defendants' hacks as a free passenger, without charge therefor, and not by special invitation from defendants, then plaintiff cannot recover, unless the jury are satisfied from the evidence that plaintiff's injury resulted from the negligence of defendants in not providing a careful and prudent driver, or in failing to provide a suit-

able hack for the occasion; and the jury are further instructed, that if they believe from the evidence that plaintiff was a gratuitous passenger at the time of such injury, these defendants were only bound to furnish such a conveyance as ordinary prudence and foresight could not discover as unsafe at the time.

7. The jury are instructed that by the pleadings in this cause, it stands admitted that the said hack, (called the Jones hack,) was at the time of the breaking of said spindle, drawn by good and sufficient and well trained and gentle horses, with suitable harness, trappings and equipments for such hack and horses, and that the same was driven by an experienced driver.

8. The jury are instructed that it is their province to judge of weight, and to determine the weight and credibility of the testimony and evidence of all witnesses in the cause, and if they find such evidence and testimony conflicting, they may believe such parts and portions thereof, as from all the facts and circumstances in evidence they believe to be most consonant and consistent with the truth, and may reject such parts and portions of such evidence as they believe to be untrue or inconsistent with other facts in evidence, which are believed by them.

9. If the jury believe from the evidence that any witness or witnesses in the cause has willfully sworn falsely to any material fact or facts in the case, then the jury are at liberty to reject the whole of the testimony of such witness or witnesses, if from the evidence they believe it ought to be so rejected.

The jury found the issues for the plaintiff, and assessed his damages at the sum of \$1,000.

*Wallace & Chiles* for appellants.

1. The petition does not state facts sufficient to constitute a cause of action. It avers that defendants are "common carriers of persons for hire," and yet, it no

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where avers that plaintiff paid, or agreed to pay, or was to pay any sum of money, or any reasonable or other hire or reward for his conveyance in defendants' hack. Besides, it appears from the petition that defendants are not of the class of persons whom the law imposes an obligation to carry, unconnected with any contract between the parties; they are not common carriers of persons, but livery stable-men and hackney coachmen: and hence, in order to the statement of a cause of action against them, a consideration for the duty or obligation must be averred. 1 Chitty's Plead., (10 Ed.) s. p. 136, 137, 33, 384; 2 Ibid., s. p. 362; Story's Bail., (5 Ed.) §§ 498, 499, 590.

2. There is error on the face of the record proper, in this case, in this, that the replication is a departure from the allegations of the petition, in material matter; the *gravamen* of plaintiff's action, as set out in his petition, is, that the hack of defendants was unsound, unsafe and unfit for use, and the alleged recklessness and gross negligence of defendants in using the same in their business; in his replication, plaintiff, in part, and as additional cause of action, avers the overloading of said hack, over rough and frozen roads, and negligence of the driver and agents of defendants in loading and driving said hack—which is inadmissible. 1 Chitty's Plead., (10 Ed.) s. p. 643, 644. Plaintiff's cause of action must be stated in his petition not in his replication. 2 Wag. Stat., § 15, p. 1017; *State ex rel. v. Griffith*, 63 Mo. 548; *Huston v. Forsyth Scale Works*, 56 Mo. 416; *Schneider v. Meyer*, 56 Mo. 475, 478.

3. Plaintiff having averred negligence against defendants, it devolved on him to prove such negligence, originally, and as part of his case, in chief, and he could not offer evidence for that purpose in rebuttal, as he did in the depositions of James, Hunt and Russell. *Read v. St. Louis, K. C. & N. R. R. Co.*, 60 Mo. 199, 206; 1 Greenl. on Ev., (4 Ed.) § 74, and note 3.

4. The court erred in permitting plaintiff recalled after the reading of the deposition of Albert Loomis, to

state in answer to a direct and leading question by his attorney, against the objections of defendants, that he never directly or indirectly offered Al. Hunt any reward for testifying in this case, as the evidence of Lemon impeached Al. Hunt, not plaintiff, and this evidence of plaintiff tended to mislead the jury, by breaking the force of the impeachment of Hunt.

5. The instructions given for plaintiff do not correctly state the law of this case against defendants as hackney coachmen. *Meier v. Pennsylvania R. Co.*, 64 Pa. St. 225; *Smith v. N. Y. Cen. R. R. Co.*, 24 N. Y. 222; Story on Bail., (5 Ed.) §§ 498, 499, 590, 592, 495; 2 Kent Com. (6 Ed.) p. 600; *Hill v. Surgeon*, 35 Mo. 212; *Ingalls v. Bills*, 9 Met. 1; *Boyce v. Anderson*, 2 Pet. 150; *Ready v. S. B. Highland Mary*, 17 Mo. 463; *Chouteau & Valle v. S. B. St. Anthony*, 20 Mo. 519; *Wolf v. The Am. Ex. Co.*, 43 Mo. 421; *Wiser v. Chesley*, 53 Mo. 547; *Jones v. Jones*, 57 Mo. 138; *Wyatt v. The Citizens R. R. Co.*, 62 Mo. 408.

6. The first instruction asked by defendants should have been given. *Wells v. N. Y. Cen. R. R. Co.*, 24 N. Y. 181; *Perkins v. N. Y. Cen. R. R. Co.*, 24 N. Y. 196; *Bissell v. N. Y. Cen. R. R. Co.*, 25 N. Y. 442. The sixth instruction asked by defendants, is a just, clear and fair enunciation of the law in regard to a free or gratuitous passenger, and comes fully within the doctrine sanctioned by this court in *Gray v. Mo. River Packet Co.*, 64 Mo. 47.

8. The instructions given for plaintiff are inconsistent with those given for defendants; defendants' instructions being based on the law of *carriers of passengers* who are not insurers, and are not liable to the extent of *common carriers*, and plaintiff's instructions being framed on the theory that defendants are stage or hackney coachmen, are liable for everything short of "inevitable accident," and hence, are a kind of insurers or warrantors of the safety of the passengers, which inconsistency is error, as the jury is as apt to act on the one as the other. *Henschen v. O'Bannon*, 56 Mo. 289.

*Phillips & Vest* for respondent.

1. The first instruction asked by defendants was properly refused. It ignored entirely the issues made by the pleadings as to the careless driving of the hack and its being overloaded. After forcing these issues upon the plaintiff, it is too late now for the defendants to complain of their being found against them. They are estopped from so doing. 1 Chitty's Plead., (7 Ed.) s. p. 648.

2. The sixth instruction asked by defendants was properly refused. There is no difference in the degree of care required of passenger carriers in the transportation of passengers for hire and gratuitous passengers. *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. 486; *Steamboat New World v. King*, 16 How. 474; Redf. on the law of Rys., (4 Ed.) vol. 2, 210, and notes; *Indianapolis & St. Louis R. R. Co. v. Horst*, 93 U. S. 295; Angell on Carr., (4 Ed.) § 528, p. 439; *McPheeters v. Hann. & St. Jo. R. R. Co.*, 45 Mo. 26.

3. The instructions given properly declare the rule as to the liability of passenger carriers. They are held to all the skill and diligence of which human care and foresight is capable, and whether they have exercised such care and foresight is a question for the jury. Angell on Carr., (4 Ed.) § 534, *et post*, and § 569, pp. 457, 497; Hilliard on Torts, (3 Ed.) p. 571; *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380; *Higgins v. Hann. & St. Jo. R. R. Co.*, 36 Mo. 418; *Sawyer v. Hann. & St. Jo. R. R. Co.*, 37 Mo. 240; *Taylor v. Grank Trunk Ry. Co.*, 47 N. H. 304; *Meier v. Penn. R. R. Co.*, 64 Pa. St. 225.

4. The proof in this case shows that defendants ran coaches and omnibuses to the depot of the railroad upon the arrival and departure of every train, not waiting for the orders of individual passengers, but soliciting the patronage of the public at large, and ready to receive all persons offering themselves as passengers. They did not follow the business as livery men and hackney coachmen,

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but as common carriers. 2 Greel. Ev., (13 Ed.) § 286, p. 186.

*Rathbun & Shewalter* for respondent.

1. The burthen as to negligence was on the defendants. *Ware v. Gay*, 11 Pick. 106; *Perkins v. N. Y. Cen. R. R. Co.*, 24 N. Y. 196, 200; *Stokes v. Saltonstall*, 13 Peters 181; Story on Bail., pp. 529, 592, § 601; *Wolf v. The Am. Ex. Co.*, 43 Mo. 421; *Hill v. Sturgeon*, 28 Mo. 323; *Higgins v. Hann. & St. Jo. R. R. Co.*, 36 Mo. 432; 2 Parson on Cont. (5 Ed.) p. 224.

2. That the passenger is riding gratuitously, or by invitation, is no defense. 2 Parsons Cont., pp. 219, 222, (Ed. of 1866); *New World v. King*, 16 How. 469; 1 Smith Lead. Cases, p. 218; *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. 468; *Todd v. Old Col. R. R. Co.*, 3 Allen 21; *Gillenwater v. Madison R. R. Co.*, 5 Ind. 340; *Nolton v. West. R. R. Co.*, 15 N. Y. 444; Story on Bail., (7 Ed.) § 590; *Thurman v. Wells*, 18 Barb. 500; *Great N. R. R. Co. v. Harrison*, 26 Law & Eq. 443; *Gladwell v. Steggall*, 5 Bing. (N. C.) 733; *Shiells v. Blackburne*, 1 Hen. Bl. 158; 2 Mees. & Wells. 143; *McPheeters v. Hann. & St. Jo. R. R. Co.*, 45 Mo. 22; *Mueller v. Putnam Ins. Co.*, 45 Mo. 84; *Wells v. N. Y. Cen. R. R. Co.*, 24 N. Y. 181; *Huelsenkamp v. Citizens Ry. Co.*, 37 Mo. 537; 43 Mo. 380; *Christie v. Griggs*, 2 Camp. 80.

NORTON, J.—This suit was instituted in the Lafayette circuit court for the recovery of damages for injuries alleged to have been received by plaintiff, in consequence of the unsoundness of a hack used by defendants, as common carriers, in transporting persons from the depot of the Missouri Pacific Railroad, in the city of Lexington, to different points in said city. The petition alleges that plaintiff was received by defendants, as a passenger, and that the hack used by them was unsound, unsafe and unfit for such use, in consequence of which, and the recklessness and



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gross negligence of defendants in using the same, it suddenly broke down, thereby greatly injuring plaintiff and disabling him permanently. The answer of defendants, after denying the allegations of the petition, sets up by way of defense that they were the owners of a livery stable in Lexington, and kept horses and vehicles for hire, and that they were accustomed to send hacks to said depot for the purpose of conveying passengers therefrom to different points in the city, and avers that defendants were not common carriers of persons, but were livery men and hackney coachmen. The answer further avers that plaintiff was a conductor on the railroad from Sedalia to Lexington, which came to and departed from said depot the morning and evening of each day; and that plaintiff was accustomed, as a gratuitous passenger, to enter into the hacks of defendants and to be carried to and from said depot. That plaintiff, on the day the injury was sustained, entered a hack of defendants without paying or expecting to pay fare; that said hack so entered was sound and road-worthy so far as could be seen or known by human foresight, skill and diligence. It is also alleged that said hack was drawn by well trained and gentle horses, which were driven by an experienced and competent driver; that the hack was not overloaded, but, from some cause unknown, and which the utmost skill and diligence could not foresee, the left spindle of the front axle gave way and occasioned the injury of which plaintiff complains.

After a motion to strike out all of said answer setting up new matter was overruled, plaintiff filed his replication traversing the same. Upon a trial of the cause, which was had in the circuit court of Saline county, the venue of the cause having been changed, the plaintiff obtained judgment for \$1,000, from which the defendants have appealed to this court. Besides the usual errors assigned are the following: First, That the petition does not state facts sufficient to constitute a cause of action. Second, That error was committed by the court in refusing to strike out

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parts of replication. Third, That the court erred in admitting illegal evidence, and in giving improper and refusing proper instructions.

It is claimed, in support of the first objection, that the petition is defective in not stating that plaintiff paid, or agreed to pay, any sum for his conveyance in defendants' hack, and because of the lack of this averment, it is argued that no contract existed between plaintiff and defendants, and consequently no cause of action. The averments in the petition charge that defendants are common carriers, and that plaintiff was accepted by them as a passenger. In such case the law implies a contract that the passenger shall pay his fare for being carried, and that he shall be safely carried, and an express contract need not be averred.

*Frink v. Potter*, 17 Ill. 406; *Thorne v. Cal. Stage Co.*, 6 Cal. 232; *Great Western Ry. Co. v. Braid*, 1 Moore P. C. (N. S.) 101. "The obligation of a carrier to carry safely, arises out of a public duty, and not from any contract to do so," and the promise to carry safely is implied from the duty, not the duty from the promise. Story on Bail., (9 Ed.) § 590, note 1.

2. The same objection, and for the same reasons, having been made to the action of the court in receiving evidence, that was made to its action in refusing to strike out parts of replication, we will consider it under the third cause assigned for error. Plaintiff offered evidence, which was received, tending to show that the hack in which he was being carried was overloaded. The evidence was objected to on the ground that the petition contained no averment that it was overloaded, and that, therefore, the replication containing such averment was a departure from the cause of action stated in the petition. It will be observed that defendants in their answer, after a specific denial of the averments of the petition as to the unsoundness of the hack, alleged as new matter that it was drawn by safe horses, was driven

1. COMMON CARRIER OF PASSENGERS: hackman; action against: petition, need not aver legal conclusions.

2. —: —: replication: departure in pleading: estoppel.

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by a careful driver, and was not overloaded. Plaintiff filed his motion to strike out this part of the answer, which the court overruled, making it necessary for him to put these facts in issue if they were not true, by denying them in his replication. If this, as is contended, amounts to a departure in pleading, the defendants, by tendering the issue in their answer, are responsible for it, and ought not now to be heard to complain of a consequence of their own act. Besides this, the hack from the mere fact of having been overloaded, if such were the fact, may have been rendered unfit for the service to which it was put. Chit. Plead., (16 Ed.) vol. 1, 677, 679.

After the defendants had closed their evidence, plaintiff was permitted to read in rebuttal the depositions of Joseph James, Al. Hunt and A. D. Russell. The evidence was objected to on the ground that it was not in rebuttal, but should have been offered as evidence in chief. We think the objection was properly overruled. "*Prima facie*, when a passenger receives injury while being carried on a train without fault of his own, there is legal presumption of negligence casting upon the carrier the *onus* of disproving it. This is the rule when the injury is caused by defect in the road, cars or machinery, or by a want of diligence or care of those employed, or by any other thing which the company can and ought to control as a part of its duty to carry the passenger safely; but this rule of evidence is not conclusive. The carrier may rebut the presumption, and relieve himself from responsibility by showing that the injury arose from an accident which the utmost skill, foresight and diligence could not prevent. *Meier v. Penn. R. R. Co.*, 64 Pa. St. 225; *Sherman & Redfield on Neg.*, § 280; *Red on Rail.*, § 1760; *Levering v. Union Trans. & Ins. Co.*, 42 Mo. 88; *Story on Bail.*, (9 Ed.) § 601. The evidence contained in the depositions tended, as we think, to rebut that offered by defendants, and was, we think, clearly admissible.

3. — : — :  
evidence, when  
receivable in re-  
buttal.

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Nor do we perceive any error in allowing the plaintiff to be recalled to state that he had never, either directly or indirectly, offered witness, Hunt, any money or reward for testifying in the case. After the attempt made by defendants to impeach said Hunt by proving that he had said if plaintiff recovered in the suit there would be money in it to him, we cannot see how defendants could have been injured by the evidence, even although it might be objectionable. It could not have prejudiced them, for it tended to show that the statement made by Hunt was false, and was, therefore, in aid of the object that defendants had in view, viz.: the impeachment of Hunt. The other objections made to the introduction of evidence not affecting either the substance or merits of the case will not be considered.

Five instructions were given at the instance of plaintiff, all of them being excepted to, and of the nine asked for by defendants, all were given except the first and sixth, which were refused, to which action exception was saved. The instructions given as well as those refused, will appear in the report of the case. The first and second instructions substantially tell the jury that if they believed from the evidence that plaintiff took passage in one of defendants' hacks and coaches, and that while the same was being driven at a moderate gait, it suddenly broke down by reason of the front axle giving way, whereby plaintiff was injured, that it rested on defendants to show that the hack was sound and roadworthy, and that the accident was caused by a defect that could not have been seen, detected or known by defendants by the exercise of the utmost skill, knowledge and inspection of said hack. It is insisted that the *onus* of proving negligence was on the plaintiff, and that the instructions are erroneous in shifting the burthen to defendants, and also because they hold defendants liable for slight neglect. The instructions, we think, are in strict harmony with the authorities. In Story on Bail., § 601, in which the liability

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of passenger carriers is treated of, it is said "as they undertake for the carriage of human beings whose lives, limbs and health are of great importance to the public as well as themselves, the ordinary principle in criminal cases where persons are made liable for personal wrongs and injuries from slight neglect, would seem to furnish the true analogy and rule. It has been accordingly held that passenger carriers bind themselves to carry safely those whom they take into their coaches as far as human care and foresight can go, that is for the utmost care and diligence of very cautious persons, and of course they are responsible for any, even the slightest neglect." The same principle is announced in the following authorities: Angell on Carr., § 569; *Ingalls v. Bills*, 9 Met. 1; *Christie v. Griggs* 2 Camp. 80; 11 Pick. 106; *Taylor v. Grand Trunk Ry. Co.*, 48 N. H. 304; *Stokes v. Saltonstall*, 13 Peters 181. In the last case cited the subject is thoroughly and exhaustively discussed. "When damage or injury happens to the passenger by the breaking down or overturning of the coach, the presumption, *prima facie*, is that it occurred by the negligence of the coachman, and the *onus probandi* is on the proprietors of the coach to establish that there has been no negligence whatever, and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent. For the law will, in tenderness to human life and limbs, hold the proprietors liable for the slightest negligence, and will compel them, by satisfactory proofs, to repel every imputation thereof." Story on Bail., § 601; *Higgins v. Hann. & St. Jo. R. R. Co.*, 36 Mo. 432; *Meier v. Penn. R. R. Co.*, 64 Pa. St. 225; *McKinney v. Neil*, 1 McLean C. C. R. 540. In *McKinney v. Neil*, *supra*, it was held that the upsetting of a stage coach is *prima facie* evidence of negligence, and a passenger who has been injured need show nothing more to sustain his action, and it will then be incumbent on defendant to show, by way of reducing the damages or in bar of the action, the circumstances of the case. The

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above authorities fully warrant instructions one and two given for plaintiff, and justified the court in refusing number one asked by defendants.

It is insisted that the third instruction in which the jury were, in effect, told that if plaintiff was a gratuitous passenger, such fact constituted no defense, and if they believed that in consideration of plaintiff notifying defendants by telegraph before the arrival of trains at Lexington of the number of persons therein who would require transportation from the depot, defendants allowed plaintiff to ride in their hacks without paying fare, that then plaintiff was not a gratuitous passenger. It is claimed that this instruction should not have been given, because there was no evidence on which to base it, and because it does not assert a correct principle. Mr. Chanslor, one of the defendants, in his evidence states that the conductor would sometimes telegraph for extra hacks; that he had told his men not to charge the conductor or railroad men. Plaintiff, in his evidence, states that he was in the habit of telegraphing to defendants before the arrival of his train the number of persons who would be likely to require carriage by them. This, we think, was sufficient to authorize the instruction. The principle announced in it, that although plaintiff might have been a gratuitous passenger, such fact constituted no defense, is supported by all the authorities which have come under our observation. While in some of them intimations are made that in the case of a gratuitous passenger, the carrier may only be liable for gross negligence, it has not been held in any of them that such fact would exempt the carrier from all liability. On the contrary, the weight of authority favors the doctrine of holding the carrier of passengers to the same degree of diligence in all cases where one has been received as a passenger, on the principle that if "a man undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross neg-



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ligence." *Shiells v. Blackburne*, 1 H. Bl. R. 115, 158; 2 Mees. & Welsb., 143. In the case of *Philadelphia & Read. R. R. Co. v. Derby*, 14 How. 468, it was held that "if plaintiff was lawfully on defendant's railroad at the time of the collision, and the collision and consequent injury to him were caused by the gross neglect of one of the servants of defendant then employed on the road, he was entitled to recover, notwithstanding the circumstance that he was a stockholder in the company, and was riding by invitation of the president, paying no fare, and not in the usual passenger car." It was also observed that "when carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy requires that they should be held to the greatest possible care and diligence, and whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless servants. Any negligence in such cases may well deserve the epithet of gross." This case was followed in the case of *Indianapolis R. R. Co. v. Horst* 93 U. S. 291; *Steamboat New World v. King*, 16 How. 469; *New York Cen. R. R. Co. v. Lockwood*, 17 Wall. 357.

In section 528, Angell on Carriers, it is stated that "the circumstance that the passenger is a steam-boatman, and as such is carried gratuitously, does not deprive him of the right of redress enjoyed by other passengers." If the above authorities go no further, they at least conclusively settle the question that a gratuitous passenger can recover for an injury occasioned by the gross neglect of the carrier, and also, that in such cases any negligence is gross negligence. This latter principle has been recognized by this court in the case of *McPheeters v. Hann. & St. Jo. R. R. Co.*, 45 Mo. 26, in which Judge Wagner observes that "counsel for appellant lay great stress on the assumption that gross negligence should be proved before defendant could be held liable. In England it is now the course of adjudication, and definitely settled, that there is no differ-

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ence between negligence and gross negligence, the latter being nothing more than the former with the addition of a vituperative epithet." The cases of *Brady v. Steamboat Highland Mary*, 17 Mo. 461, and *Gray v. Mo. River Packet Co.*, 64 Mo. 47, to which we have been cited, do not apply. In the former the only point decided was that "negligence is not a conclusion of law simply from the fact that a boat passed a dangerous point in the river, known to be difficult to pass, in the night." In the latter case the principle contended for by defendants was said to be correct when applied to a mere mandatory as contradistinguished from a common carrier.

While the fifth of plaintiff's instructions, from the failure of the court to insert the words "from the evidence" after the words "think" and "believe," when they occur therein, is objectionable in its phraseology, and subject to the criticism made by counsel, we are of the opinion that the jury could not be misled by their non-insertion, as they were necessarily implied.

The evidence tended to show that plaintiff was incapacitated by the injury to transact business for three months, during which time he suffered great pain; that he was still suffering from it, and that it was of a permanent nature. These matters were properly referred to the jury for consideration by them in their estimation of damages; and the question as to whether the injury was occasioned by the negligence of defendants has been fairly submitted to the jury. The judgment will be affirmed, with the concurrence of the other judges.

AFFIRMED.

LYNDE V. WILLIAMS *et al.*, *Plaintiffs in Error.*

1. **Linn County Probate Court: EXECUTION SALES.** The general law respecting execution sales of real estate, (1 Wag. Stat., § 42, p. 600,) requires them to be made on some day during the term of the circuit court of the county where such real estate is situated. The act creating the probate court of Linn county, (Sess. Acts of 1853, § 6, p. 392,) provides that "all sales and executions shall be governed and conducted in like manner as sales now are, or may hereafter be, in the circuit court in this State," and by section 7, requires that deeds of sheriffs, making sales under executions issued from that court, shall be acknowledged before the probate judge in probate term time; *Held*, that these provisions do not impliedly and necessarily confer a power to sell at any other time than the general law directs; and that a sale of real estate under execution during the session of the Linn probate court, and not during the session of the circuit court, was a nullity. Following *Mers v. Bell*, 45 Mo. 333.
2. ———: ———: **DESCENTS AND DISTRIBUTIONS.** Where one dies leaving a widow and child, and the child dies without issue, the mother surviving, she becomes the heir of the child. 1 Wag. Stat., § 1, p. 529.
3. ———: **ADVERSE POSSESSION.** The actual, exclusive, open, continuous and adverse possession of a part of a tract of land for ten years by one claiming title to the whole tract, under deeds purporting to convey the same, will vest in such claimant the absolute title to the whole tract.
4. ———: ———: **MUST BE PROVEN, CANNOT BE PRESUMED.** If such possession, however, be commenced by *disseizin*, such person, until the lapse of ten years, continues to be a mere *disseizor*, and his *disseizin* will not be presumed to continue until the contrary appears; his possession for the requisite period must be proven, and will not be presumed.
5. **Lands and Land Titles: ADVERSE POSSESSION, WHAT NOT SUFFICIENT PROOF OF.** The proof of an act done on the premises, which merely indicates an intention to hold the land, such as the posting on the land of a notice to the owner of such intention, is not sufficient proof of such possession.

*Error to Linn Circuit Court.*—HON. G. D. BURGESS, Judge.

This action was brought against Williams, the occupant, and afterwards Erskine, his landlord, was, by agreement, made a party defendant. The deeds relied on by

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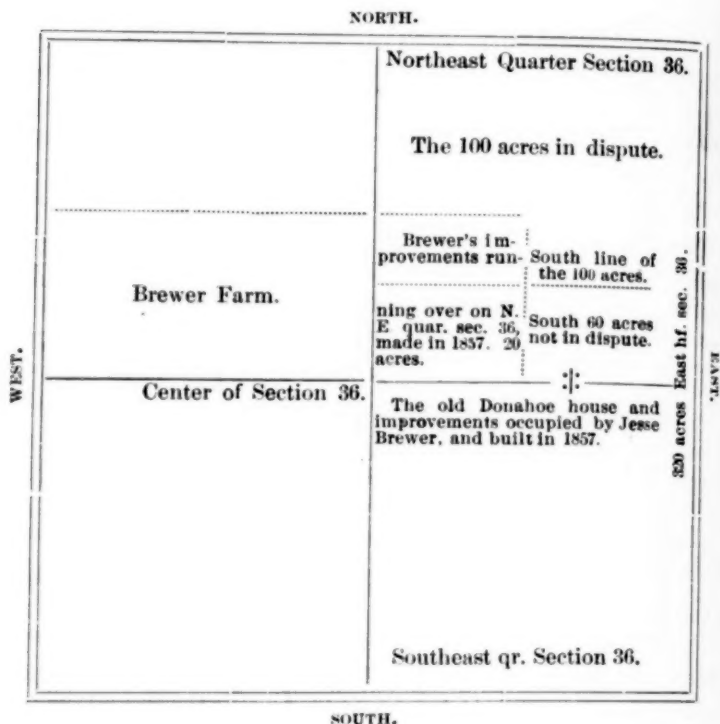
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plaintiff, as color of title, to make out title by adverse possession under the statute of limitations, were the following: From the register of lands to A. H. Donahoe, of date January 2nd, 1856, for the east half of section 36; from A. H. Donahoe to Stephen Donahoe, of date February 10th, 1857, for the same; from Stephen Donahoe to William S. Donahoe, of date May 24th, 1858, for the same; from W. S. Donahoe to Hamilton DeGraw, of date — day of —, 1867, for the northeast quarter of section 36; from F. H. DeGraw to Hamilton DeGraw, of date November 6th, 1865, for the same; from H. DeGraw to John P. Jones, of date November 22nd, 1867, for the same; from John P. Jones to plaintiff, of date July 25th, 1868; from Otho Reams to H. DeGraw of all his improvements upon the land, of February 10th, 1866, and a lease back to said Reams from DeGraw of same date for the northeast quarter, commencing March 1st, 1866, and running to March 1st, 1867; a lease from H. DeGraw of same to J. A. Arbutnot, of date August 3rd, 1866, running to March 1869; a conveyance from Jesse H. Brewer of all his interest in the same, together with his improvements, of date of July 5th, 1867. In connection with these conveyances, testimony as to the possession was given, tending to prove that in 1857 or 1858, William Brewer, who owned a farm of eighty acres adjoining on the west, by mistake, fenced over on the land claimed by Donahoe, and, altogether, took in about twenty acres of this land, which was broken up by him; that, after the mistake was discovered, he consented to hold the same as the tenant of W. S. Donahoe, and did so hold until 1864, when he turned over the place to his son, Jesse Brewer, who, in 1865, sold the improvements to Otho Reams, who took possession and raised a crop on the land; that the old Donahoe house on the southeast quarter was occupied in 1866 by Jesse Brewer as tenant of Donahoe; and that Donahoe's possession had run from 1858, through his tenants and those claiming under him, to 1868

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or 1869. The subjoined plat will assist in understanding plaintiff's case.



The defendant claimed title under Jonathan Floyd, the original patentee. He offered and read in evidence a power of attorney by Thomas Floyd, therein named as sole heir at law of Jonathan, to E. W. Cecil, of date September 9th, 1858; a deed from Thomas Floyd, by Cecil, as attorney in fact, to defendant, Erskine, of August 22nd, 1859. He read depositions showing that Jonathan Floyd died in 1823, leaving a widow and son; that the son died unmarried without issue, leaving his mother surviving him; that his mother married a Mr. Neal and moved to Kentucky. Defendant also claimed to have acquired the Donahoe title and possession through a sheriff's deed, of

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date September 1st, 1862, to N. D. Stephenson, on a judgment of May 5th, 1862, in the probate court of Linn county, against W. S. Donahoe, upon which the whole east half of section 36 was levied on and sold as his property for \$3.00. This deed recited that such sale was made "at the court house of my said county of Linn, during the session of the probate court of Linn county, at the September term thereof, for the year 1862." Defendant also read a deed from N. D. Stephenson, of said land to the defendant, Erskine, of date December 16th, 1872. He also offered testimony to show that when possession was taken by him in 1870, the land was vacant and without any improvements upon it.

The court, on plaintiff's motion, gave the following instructions :

1. The jury are instructed that if they believe from the evidence that defendants only claim to connect themselves with the title of Jonathan Floyd, patentee, by and through a deed from Thomas Floyd; and further believe from the evidence that said Jonathan Floyd died about the year 1822, leaving a widow and one son, and that the son died intestate, without children, leaving his mother surviving, and that defendants do not claim title from either the mother (now Mrs. Neal) or her son, then the jury are instructed that defendants have failed to connect themselves with the title of the patentee, Jonathan Floyd.

2. The jury are instructed that the defendants have not shown any legal paper title to the land in controversy, unless the jury believe from the evidence that Thomas Floyd was the son or only heir at law of Jonathan Floyd, the patentee; and if the jury believe that Donahoe, by his tenant, Brewer, had the first actual possession of part of said land, claiming the whole tract under color of title thereto, and that plaintiff succeeded to his possession, and that such possession was not abandoned, then the jury are bound to find for the plaintiff.

3. The jury are instructed that the deed read in evi-



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dence from the heirs of Stephen Donahoe to W. S. Donahoe, of date 24th day of May, 1858, the conveyance from Jesse Brewer, Otho Reams and W. S. Donahoe to DeGraw, and the conveyance from DeGraw to John P. Jones, and from John P. Jones to the plaintiff, are sufficient color of title upon which to predicate an adverse possession under the statute of limitation, and if they believe from the evidence that the plaintiff, and those under whom he claims, have had the actual, exclusive, open, continuous and adverse possession as against the defendants, of any part of the tract in question, claiming the whole tract under such color of title for ten years prior to the time that defendant Williams got into possession on the — day of August, 1870, then such color of title and adverse possession would vest the absolute title in the plaintiff, and the jury are bound to find their verdict for the plaintiff.

4. The jury are instructed that a possession once shown to exist is presumed to continue until the contrary is shown, and they are further instructed that to constitute possession, it was not necessary that the plaintiff, or those under whom he claims, should live on the land or keep any person thereon, but that any acts done on the premises indicating an intention to hold the land, is sufficient.

Defendants asked the following instructions:

1. The jury are instructed that it is admitted that the land in suit was patented to Jonathan Floyd by the United States, and defendants have shown a perfect chain of title from one Thomas Floyd, claiming to be an heir of patentee, and if the jury believe that said Thomas Floyd is the only heir at law of Jonathan Floyd, they are bound to find for defendants, unless plaintiff, or those under whom he claims, were in the actual, open, adverse and continuous and exclusive possession of said premises, under color of title for ten years, next before defendant Erskine, and those under whom he claims, may have been in possession thereof under claim and color of title to said premises.

2. If the jury believe from the evidence that Wm.

Brewer occupied the land as tenant of Donahoe, and he turned the possession over to his son, and he to Reams, then Reams was tenant of Donahoe, and no sale by him (Reams) to DeGraw, could prejudice Donahoe's right to the possession, and this right of Donahoe's possession having been transferred to defendant Erskine, by color of title from Donahoe, they are bound to find for the defendants.

3. Before the jury can find that plaintiff, and those under whom he claims title, were in the actual, open, notorious, continuous and adverse possession of the premises here sued for, for ten years or more before the possession was taken by defendant Erskine, they must find that such possession was continuous as well as adverse, and if they further find that there was a break in such possession, or that said premises were not in the possession of any one for one or more years during that time, that the same was not continuous.

4. The burden of proof in this case devolves upon the plaintiff, and unless said plaintiff has established the issues in this case in his favor by a preponderance of the evidence, and to the satisfaction of the jury, they will find their verdict for the defendants.

5. If the jury believe that in 1858 William Brewer took and held possession of the lands in dispute as the tenant of W. S. Donahoe, from that time up to about 1864, and then turned said possession over to Reams, and that Reams kept and held said possession up to February 10th, 1866, and then transferred the same to Hamilton DeGraw, then the jury are instructed that the sheriff's deed to Stephenson transferred and conveyed said premises to said Stephenson, and the deed from said Stephenson to defendant Erskine transferred and conveyed said possession to said defendant, and they will find for defendants.

6. The jury are instructed that if they believe from the evidence that W. S. Donahoe was, by himself or tenants, in possession of the land in controversy up to the 10th day of February, 1866, and that prior to that date the

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same had been sold under execution against him, and a sheriff's deed made to the purchaser, and the purchaser conveyed to Erskine, one of the defendants, such conveyance conveyed to Erskine the constructive possession and a right to the occupancy as against Donahoe; and if they further find that after that date DeGraw, under whom plaintiff claims, bought Donahoe's possession and held the premises, then they are bound to find for defendants, unless they find from the evidence that Donahoe and Erskine had wholly abandoned the possession prior to February 10th, 1866.

7. It appearing from the evidence that defendants entered on said land under color of title in August, 1870, and have since remained in possession, then plaintiff cannot recover, although he, or those under whom he claims, may have been in possession of said land in 1866 and 1867 under color of title, unless the jury further find that plaintiff, and those under whom he claims, had been in the adverse possession of said land for ten years before defendant took possession, and that such possession had not been abandoned.

8. The jury are instructed that it is admitted in evidence that the land in question was patented to Jonathan Floyd, and that he died, leaving a widow, who is his heir at law, and plaintiff having shown no legal title to the land, the jury must find for the defendants, unless they believe from the evidence that plaintiff, or those under whom he claims, held the land adversely to the heir of Floyd for more than ten years before defendant's entry.

9. If the jury believe from the evidence that Wm. Brewer occupied the land as tenant of Donahoe, and that he turned over the possession to his son, and he to Reams, then Reams was tenant of Donahoe, and no sale by him (Reams) to DeGraw, could prejudice Donahoe's right to the possession, and this right of possession having been transferred to defendant Erskine, through the sheriff's deed on

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execution against Donahoe, they are bound to find for defendants.

The court gave the instructions numbered 1, 3 and 4, and refused to give those numbered 2, 5, 6, 7, 8 and 9, to which defendants duly excepted. The court, on its own motion, gave the following instruction:

"If the jury believe from the evidence that William Brewer occupied the land as tenant of Donahoe, and he turned the possession over to his son, and he to Reams, then Reams was tenant of Donahoe, and no sale by Reams to DeGraw could prejudice Donahoe's right to the possession, and if Donahoe's possession was transferred to defendant Erskine, by color of title from Donahoe, they are bound to find for defendants."

The jury found for the plaintiff.

*W. H. Brownlee* and *C. D. Dobson* for plaintiffs in error.

*S. P. Huston* for defendants in error.

SHERWOOD, C. J.—Ejectment for 100 acres of land, a plat of which is hereto annexed. The suit was brought September 2nd, 1870.

We do not regard Erskine as having acquired any interest in, or right of possession to, the land by reason of his purchase from N. D. Stephenson, who bought Wm. S. Donahoe's interest in the east half of section 36, at sheriff's sale in 1862; and for this reason: The general law respecting execution sales, requires them to be made at the court house door on some day during the term of the circuit court of the county, &c. 1 Wag. Stat., § 42, p. 609; *Jackson v. Magruder*, 51 Mo. 55; *Merchants Bank v. Evans*, Id. 335; *McClurg v. Dollarhide*, Id. 347; *Bruce v. Leary*, 55 Mo. 431. In *Mers v. Bell*, 45 Mo. 333, the sale under execution took place during the session of the circuit court of Cass county and it was held that such sale was properly made, notwithstanding the execu-

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PROBATE COURT:  
execution sales.

tion issued from the common pleas court of Cass county. There was no express authority conferred by the act creating that court to have execution sales take place during the sessions of that court, and it was held that the concluding words of section 7 of that act, (laws 1867, p. 86,) providing that: "Judgments rendered by said common pleas court shall be liens on all real estate situated in said Cass county, and with like effect as judgments of the circuit court, and shall be proceeded upon to execution sale in the same manner as is prescribed by law for judgments in the circuit court," did not impliedly confer authority that execution sales might occur during the session of the common pleas court. The sale to Stephenson took place during the session of the probate court of Linn county. The act creating that court, (laws 1853, p. 392,) by the sixth section, provides that: "All sales and executions shall be governed and conducted in like manner as sales now are, or may hereafter be, in the circuit court in this State."

It will be observed that the words just quoted are of similar import to those contained in the section quoted in *Mers v. Bell*, *supra*, words which in that case, were, as just seen, held not to admit of a construction authorizing the occurrence of sales under executions, otherwise than as prescribed by the general law. Nor do we conceive that section 7 of the act establishing the Linn probate court, requiring that deeds of sheriffs, making sales under executions issued from that court, should be acknowledged before the probate judge in probate term time, would impliedly and necessarily confer a power to sell at any other time than the general law directs. And unless the words of the 7th section would of necessity bear that sort of construction, we must, under the authority of *Mers v. Bell*, *supra*, hold the sale which occurred during the session of the Linn probate court a nullity. These remarks uphold the court below in its refusal to instruct in reference to that sale, as prayed by defendants.

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Nor are we of opinion that the court erred in giving the first and second instructions on behalf of the plaintiff.

2. —: —: It was shown by the evidence that Thomas <sup>descents and distributions.</sup> Floyd was the nephew of Jonathan Floyd, the admitted patentee of the land; that Jonathan Floyd died in 1823, (his father and mother having predeceased him,) leaving at his death a widow and son; that the son died without issue, his mother surviving him. It is quite plain, under our statute of descents and distributions, that the mother became the heir of her son, 1 Wag. Stat., § 1, p. 529, and that in consequence thereof, Thomas Floyd derived no title from the patentee.

Aside from mere verbal criticism, plaintiff's third instruction was unquestionably correct, asserting, as it does, a doctrine so often enunciated by this court 3. —: adverse possession, — *Key v. Jennings*, 66 Mo. 356, and cases cited; and there was evidence tending to show adverse possession for the requisite period on the part of those under whom plaintiff claims; and this was sufficient basis to maintain ejectment on, notwithstanding that after the expiry of the statutory period, those under whom plaintiff claims had abandoned the premises, and they were found thus abandoned in 1870, when Williams, as tenant for Erskine, took possession.

But we cannot give sanction to the fourth instruction on behalf of plaintiff. If he and those under whom he claims were possessed of the premises in controversy for a sufficient length of time, as set out in plaintiff's third instruction, this conferred the title on plaintiff. It is, however, evident that such title, if acquired, was the result of *disseizin*, and that plaintiff and others from whom he derives title, were, until the lapse of the statutory period mere *disseizors*. It is true that the existence of many things once proven to exist, are presumed to continue; but we do not regard that rule of presumption as applicable to the present instance. The books indeed lay down that a *seizin* once proved, or admit-



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ted, is presumed to continue until a *disseizin* is proved, 1 Greenl. Ev., § 42; but it certainly cannot be true that if you establish the existence of a *disseizin* at one period its continuance must, therefore, be presumed until the contrary appear. Under such a ruling and theory of the law, the transfer of the title of the true owner to a mere *disseizor*, would, it must be confessed, be greatly facilitated; and the real owner, in consequence of a few months adverse possession at some remote and forgotten period, would frequently be presumed out of his estate. The plaintiff's sole reliance for recovery was such a possession of the premises in dispute, and for the requisite period, as described in his third instruction, nothing short of a proof of such a possession would answer, and the burden of proof was on his shoulders to fully and affirmatively establish this. *Brown v. King*, 5 Met. 173. He could not, therefore, eke out the necessary facts, which alone would entitle him to recover, by presumptions.

Nor can we approve the concluding portion of the fourth instruction now under discussion, for yet another

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LAND TITLES: ad-  
verse possession,  
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reason: That portion declares "that any acts done on the premises indicating an intention to hold the land is sufficient." This language is altogether too loose. Under such an instruction, the mere posting of a notice on the land notifying the owner that the notifier intended to hold the land, would be sufficient. Our court has gone a great way in respect to what constitutes adverse possession, but certainly never so far as to sanction such an instruction. Had the evidence as to adverse possession on the part of plaintiffs been conclusive, we might have not reversed the judgment, because of the fourth instruction, but have contented ourselves with condemning the errors which it contains; as it is, however, we cannot certainly say but that the jury were greatly influenced by its erroneous teachings in rendering their verdict. We, therefore, reverse the judgment and remand the cause. All concur.

REVERSED.

The Hannibal & St. Joseph Railroad Company v. Clark.

THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant*.  
V. CLARK.

1. **Evidence:** DECLARATIONS. The declaration of one in possession of property explanatory of his possession, as that he held in his own right, or as tenant, or as trustee, are admissible for the purpose of explaining his possession; but his declaration in regard to the contract by which he acquired possession are not receivable in his favor. (Following *Darrett v. Donnelly*, 38 Mo. 492.)
2. — : — : EXCLUSION OF, NOT GROUND OF REVERSAL WHEN. The ruling of the trial court in excluding evidence, although excepted to at the time, will not be reversed by the Supreme Court, unless the exclusion of proper evidence was assigned, as error, in the motion for a new trial. (Following *Brady v. Connelly*, 52 Mo. 19.)
3. — : CERTIFICATE OF ENTRY, SUFFICIENT AS COLOR OF TITLE, WHEN. A certificate of entry obtained in good faith, upon the payment of the entrance money, from an officer having a right to make sales of public land, is sufficient color of title in connection with the adverse possession of a part of a tract of land, in the name of the whole, to vest the title to the whole tract in the purchaser, under the statute of limitations.
4. — : — , AS COLOR OF TITLE, UNAFFECTED BY CANCELLATION OF, WHEN. The cancellation of such certificate of entry by the commissioner of the general land office, if not brought home to the knowledge of the purchaser, will not destroy his color of title, and remit him, in his right of recovery, to that portion of the land actually in his possession for the period prescribed by the statute of limitations. *Quære*, whether it would do so, in case the cancellation were brought to the knowledge of the purchaser.

*Appeal from Monroe Circuit Court.*—HON. JOHN T. REDD,  
Judge.

*Geo. W. Easley* for appellant.

1. James Clark's declarations should have been excluded, because made in reference to his title and not his possession. *Darrett v. Donnelly*, 38 Mo. 492; *McBride v. Thompson*, 8 Ala. 650; *Maus v. Sturtevant*, 23 Ala. (N. S.) 664.

2. The letter and proofs in the pre-emption proceeding should have been admitted for the purpose of showing the

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character of Clark's possession; they would have shown that the land was not subject to pre-emption. *Peas v. Lawson*, 33 Mo. 35.

3. The certificate of the entry by Clark, under the homestead act, was not color of title, because the land was not subject to entry under that act. It was an alternate section to those granted to the State to aid in building the appellant's road, under 10 U. S. Stat. at Large, p. 9, § 2, and afterwards selected by the State in lieu of other lands. 5 U. S. Stat. at Large, p. 455, § 10. To constitute color of title, there must be nothing on the paper, or in the transaction, to show that it is illegal or prohibited by law, because, if such should appear, it would charge the party with notice of the defect, and render his claim *mala fide*. Blackwell on Tax Titles, 567; *Bowman v. Wettig*, 39 Ill. 416; *Swope v. Saine*, 1 Dill. C. C. 416; *Moore v. Brown*, 11 How. 414.

4. If the certificate of entry was color of title when issued, it ceased to be such when cancelled. The color of title and the possession must concur for the full period of the statute. Blackwell on Tax Titles, (4 Ed.) 650; *McIver v. Rayan*, 2 Wheat. 29; *Livingston v. Peru Iron Co.*, 9 Wend. 511; *Sydnor v. Palmer*, 29 Wis. 226; *Jackson v. Thomas*, 16 Johns. 293. Although Clark's possession may have been adverse as to the whole tract, as its inception, yet the character of the first possession was changed by the cancellation of his certificate of entry, and that cancellation ought to have been considered as denoting *quo animo* the possession of the portion outside his inclosure was held by him.

5. The respondent should have been confined to the *pedis possessio* of James Clark. *St. Louis v. Gorman*, 29 Mo. 593; *DeGraw v. Taylor*, 37 Mo. 310.

Wm. J. Howell for respondent.

NORTON, J.—This is an action of ejectment, commenced

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on the 23rd day of April, 1872, in the circuit court of Monroe county, for the recovery of the northeast qr. of section 27, township 54, range 8. The petition is in the usual form. The answer admits possession, denies plaintiff's right thereto, and sets up the statute of limitations as a bar to plaintiff's right of action. The plea of the statute was put in issue by replication, and the cause was tried at the April term, 1876, of said court, and after the evidence was heard and instructions given, plaintiff took a non-suit with leave to move to set the same aside, which motion having been made and overruled, the cause is brought here by appeal.

Plaintiff derived title to said land under act of Congress, approved June 10th, 1852, granting lands to the State to aid in the construction of certain railroads; also under an act of Congress of August 3rd, 1854, and an act of the General Assembly of the State accepting the grant, and applying a portion of the lands thus granted to the Hannibal & St. Joseph Railroad Company. In support of its title, plaintiff offered the same evidence which was offered in the case of the *Hannibal & St. Jo. R. R. Co. v. Smith*, 41 Mo. 310.

The defendant, in support of his title, offered evidence subsequently as follows: That on the 9th day of January, 1855, James Clark entered the land in controversy at the United States land office in Palmyra, and received therefor a certificate of entry No. 31,826; that, immediately thereafter, he went into actual possession and fenced about ten acres, and in the spring following inclosed twenty-five or thirty acres more by fencing it, and remained in the actual possession thereof till his death, which occurred in February, 1862; that after the death of said James Clark, defendant, as his administrator, immediately took possession and has remained in possession ever since, and, in 1869 and 1870 inclosed the whole of said land; that in 1858 said Clark sent his certificate of entry to Washington City to L. L. Anderson, to procure his patent, who sent it to the

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land office, and was informed that the entry had been canceled; that the certificate of entry was lost; that the taxes on said land were paid by said James Clark up to the time of his death, and since that time have been paid by defendant.

During the progress of the trial a witness was asked if he ever heard James Clark say how he claimed title to the land, and was permitted to answer the question over the objection of plaintiff, and said

1 EVIDENCE: declarations.

"that he claimed this land by entering it and paying taxes on it. I have heard him speak of it as his own. He claimed it by going to the land office, by getting the certificate and paying his money for it." The declaration of one in possession of property explanatory of his possession, as that he held in his own right, or as tenant or trustee, is admissible for that purpose, but his declarations in regard to the contract by which he came into possession, are not receivable in his favor. *Darrett v. Donnelly*, 38 Mo. 492. Under this rule, so much of the answer of witness which stated that he heard his father claim the land as his own, was receivable. The remainder of his answer appears to be an affirmation of facts of which the witness himself was cognizant; for he had previously stated that he was with his father at the land office, that his father entered the land in his presence, paid his money for it, and got his certificate, and paid taxes on it up to the time of his death.

The action of the court in sustaining the objection made to a certified copy of a letter from the commissioner of

2 ———: ———: the general land office dated July 3rd, 1856, showing that James Clark's entry had been cancelled, and, also, the proofs made by Clark when he made the entry offered in evidence by the plaintiff, cannot be reviewed by us, because the exclusion of proper evidence is not assigned as error in the motion for a new trial. Although plaintiff excepted to the ruling of the court in excluding the evidence, he did not raise the

exclusion of, not ground for reversal, when.

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objection on the motion for new trial. *Brady v. Connelly*, 52 Mo. 19.

The action of the court in giving and refusing instructions is also assigned for error. Plaintiff asked the following declarations: 1. The documentary evidence of title shows a complete title in the plaintiff, and the jury will find for plaintiff. 2. The certificate of entry to the land in controversy given by the register of lands at Palmyra, Missouri, to James Clark, shows no title in said Clark, and as a consequence, none in the defendant. 3. Said certificate of entry is not even color of title in said James Clark, or of defendant, who claims under him. 4. Even if said certificate of entry were color of title in said James Clark and the defendant claiming under him, still, if the jury believe from the evidence that the commissioner of the general land office of the United States, on the 31st day of July, 1856, cancelled said certificate, then said certificate no longer constituted color of title. 5. Under the pleadings and evidence in this case, the statute of limitations only ran against the plaintiff for so much of the land in controversy as was actually inclosed by James Clark and his heirs, and possession held by them for a period of ten consecutive years prior to the 23rd day of April, 1872. 6. The defendant, and the person under whom he claims, cannot acquire title to the land in controversy against the plaintiff by actual, open, notorious and adverse possession.

The court gave the instruction numbered two, and refused the others, and appellant excepted. The respondent then asked the following instructions: 1. If the jury believe from the evidence that James Clark came into the actual possession of a part of the land sued for about the year 1855 or 1856, and fenced up and held said part till the time of his death, about the year 1862, and after his death the defendant came into possession of the same under him, as his administrator, and one of his heirs at law, and has held the possession of the same until the present time, claiming to hold under the said James Clark, and that the



said James Clark, and the defendant since his death, have continuously, for a term of over ten years prior to the commencement of this suit, held the visible, notorious, actual and adverse possession thereof, against the plaintiff and all other persons, and claiming to be the owner thereof successively, as aforesaid, the jury should find for defendant as to such part of said tract. 2. If the jury believe from the evidence that James Clark entered the land in controversy at the land office at Palmyra about the 25th day of August, 1855, and obtained from the officers of said land office a certificate of said entry, and immediately took possession of said land, and in said year fenced up a part thereof, and afterwards fenced up more of the same, and died about the year 1862, and the defendant came into possession of said land, as the administrator and one of the heirs at law of the said James, under him and claiming to hold under him till the present time, and that the said James, in his life-time, and the defendant since his death, have successively and continuously held the possession of said part of said land so fenced up under said certificate of entry, in the name of the whole tract in controversy, visibly, openly, notoriously, actually adversely to the plaintiff, and all other persons, and claiming to own the whole tract for a period of more than ten years before the commencement of this suit, and have exercised during the time of such possession the actual acts of ownership over the whole tract in controversy, the jury should find for the defendant. The court gave both these instructions, and the appellant excepted. The court, upon its own motion, then gave the following instructions: 1. The act of Congress of June, 1852, the act of the General Assembly of the State of Missouri of September, 1852, in connection with the list of lands selected by the State, as certified by the commissioner of the general land office, and the approval of said list by the Secretary of the Interior, and other documentary evidences of title read in evidence by plaintiff, operate to vest in plaintiff the title to the land

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sued for, and the verdict should be for the plaintiff, unless the jury further find that James Clark, and defendant claiming under him, had such actual possession of the land, or a part thereof, as would authorize a verdict for defendant under the first or second instructions given by defendant. 2. The possession of James Clark, and defendant claiming under him, of the tract sued for, or any part thereof, is no bar to plaintiff's action as to such tract or part thereof, so held in possession, unless such possession was actual, open and notorious, and under claim of title.

It is insisted that the action of the court in giving and refusing the above instructions was erroneous on two

grounds, viz.: First, because the certificate of entry gave no color of title, and second, because, if sufficient to give such color, its cancellation by the commissioner of the general land office destroyed the color and remitted Clark in his right of recovery to his *pedis possessio*, or to that portion of the land actually possessed by him for a period of ten years before the institution of this suit. Neither of these objections are well taken. While the certificate of entry did not invest Clark with the legal title, yet it was sufficient under our statute to enable the holder to maintain or resist ejectment. The evidence, we think, clearly shows that it was obtained in good faith, that Clark paid the entrance money and received a certificate of purchase from an officer having a right to make such sales, and entered upon the land under his purchase. "The phrase, color of title, implies that some act has been done, or some event has occurred, by which some title, good or bad, has been conveyed." *Myler v. Hughes* 60 Mo. 105. A defective conveyance, or a conveyance from one having no title, if taken *bona fide*, may be used in connection with adverse possession of a tract of land in the name of the whole tract, so as to acquire title under the statute of limitations. *Chapman v.*

3. —: certificate of entry, sufficient as color of title, when.

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*Templeton*, 53 Mo. 463. Instructions numbered three and five were, therefore, properly refused.

It is further contended by counsel that the cancellation of Clark's certificate of entry rendered it null and void, and destroyed the color of title under which he claimed the land, and that, therefore, the fourth instruction asked by plaintiff should have been given. If, as is contended by plaintiff, the effect of the cancellation of the certificate of entry was to destroy defendant's color of title, it would seem to be essential that knowledge of such cancellation should have been brought home to Clark, in order to restrain the operation of the statute, and confine defendant to the recovery only of that part of the land actually in possession. This question of knowledge is entirely ignored in the instruction, and for that reason, if no other, the instruction was properly refused. We do not undertake to say that knowledge of the cancellation on the part of Clark would, from the time he received it, have remitted him to his actual possession, but we do say that the mere cancellation, unless the knowledge of it was brought home to Clark, could have no such effect, and that is all we are called upon to determine in this case

Judgment affirmed with the concurrence of the other judges.

AFFIRMED.

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Van Petten v. Richardson.

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VAN PETTEN, *Plaintiff in Error*, v. RICHARDSON.

**Contribution between Co-debtors.** The doctrine of contribution is the result of general equity based on the ground of equality of burden and benefit, is equally applicable between principals as between sureties, and has been adopted as a rule of common law in this State. A debtor, therefore, may recover from his co-debtor, in an action at law, whatever he has been compelled to pay in excess of his due proportion, not only of the original demand, but of all costs necessarily incident thereto; and in determining this proportion, regard will be had only to the co-debtors who are solvent.

*Error to Pettis Circuit Court.*—HON. WM. T. WOOD, Judge.

This action was brought before a justice of the peace by the plaintiff, to recover of defendant one-sixth of the costs of a judgment, obtained against plaintiff and defendant and five others, one of whom was insolvent; which costs the plaintiff alleged he was compelled to pay, and did pay by a sale of his property under execution. On appeal to the circuit court judgment was rendered for the defendant.

*E. J. Smith* for plaintiff in error.

It will not be denied that as between co-defendants they are liable to each other for contributions each for his aliquot part, dividing the whole by the whole number of defendants. Neither will it be denied that in equity any one who is insolvent may be left out and contribution made among the others, each sharing alike. The only question is which rule governs in this case. We say the equity rule. Because in this State we have blended law and equity and abolished the distinction, and while justices' courts are courts of statutory creation and jurisdiction, yet they are *ex necessitate* courts of equity jurisdiction in some cases. The rule of equity as to leaving out insolvents and apportioning among others is the rule of law in Vermont. *Mills v. Hyde*, 19 Vt. 59. It is also the rule in New Hampshire. *Henderson v. McDuffee*, 5 N. H. 38.

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*Snoddy & Short and L. L. Bridges* for defendant in error.

The justice of the peace had no jurisdiction, and consequently the circuit court could exercise none. At law, where one of several co-debtors becomes insolvent, the one paying cannot recover of another more than the share for which he was originally liable; for further relief he must resort to equity. *Brown v. Lee*, 6 B. & C. 689, 697; *Chaffee v. Jones*, 19 Pick. 260; *Cowell v. Edward*, 2 Bos. & Pull. 268; *Deering v. Lord Winchelsea*, 2 Bos. & Pull. 270; 8 Am. Law Reg., 455; Fell's Law of Guar. and Sur., p. 280; *Peters v. Rich*, 1 Ch. R. 34; *Hole v. Harrison*, 1 Ch. R. 240. This doctrine applies to co-debtors as well as to co-sureties. 8 Am. Law. Reg., 455. Will it be contended that a justice of the peace has equity jurisdiction? *Ridgely v. Stillwell*, 28 Mo. 400.

SHERWOOD C. J.—It was at first denied in the courts of common law, that any right to contribution could be maintained as between co-sureties or co-promisors. Fell's Law of Guaranty and Suretyship, 295, and cases cited. Courts of equity, however, have from a remote period compelled contribution in such cases. 1 Story Eq. Jur., § 493, and cases cited. The principle on which such right is based, is said to be this, that all who are in *equali jure*, must bear the burden equally, and that this is but in conformity to the maxim that "equality is equity." *Norton v. Coons*, 3 Denio 130; *Moore v. Moore*, 4 Hawks 358. It is elsewhere said that the doctrine of contribution does not 'stand upon any notion of mutual contract, express or implied, between the sureties to indemnify each other in proportion (as has been sometimes urged); but it arises from principles of equity, independent of contract.' 1 Story Eq. Jur., § 493, and cases cited. Courts of law have long since adopted the doctrine of contribution, and now allow actions of *assumpsit* or *indebitatus assumpsit* to be maintained by one co-surety or

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co-debtor, for any excess of the common indebtedness which he may have discharged over his proportionate share. 3 Denio., *supra*; *Kemp v. Finden*, 12 Mees. & Welsb. 421; *Morrison v. Poyntz*, 7 Dana 307; *Bachelder v. Fiske*, 17 Mass. 464; *Mason v. Lord*, 20 Pick. 447; Fell's Law of Guaranty and Suretyship, 297.

Courts of law, however, although they borrowed their jurisdiction in regard to contribution from courts of equity, and enforced their newly acquired jurisdiction in accordance with common law forms of action, still felt themselves so hampered in the exercise of their newly found powers, that they refused to allow a surety who paid a debt to recover from his co-surety more than his aliquot or proportional part of the payment thus made; and this was the sole measure of recovery, notwithstanding the insolvency of one or more of the sureties. 1 White's Lead. Cases in Eq., p. 123, and cases cited. In equity, the rule was far different; there the recovery, in case of insolvency, was apportioned among all the solvent sureties. 1 Story Eq. Jur., § 496, and cases cited. It would seem quite obvious that courts of law, in adopting the views of equity relative to contribution, should have done so, in their fullest extent, and consequently, when they allowed a recovery based on an equitable right, they should have made that recovery as broad as the right in which it had its origin, and, therefore, should have afforded a relief as large as could have been afforded, had that relief been sought in that *forum* which first gave recognition to the right. Mr. Justice Redfield, after adverting to the fact that some of the American courts of law now follow the equitable rule as to apportioning the share of an insolvent surety, among those remaining solvent, says: "The distinction in the extent of redress between a court of law and a court of equity, in cases where some of the sureties are insolvent, is certainly not based upon any very obvious principle affecting the different jurisdictions. It has more the appearance of an arbitrary rule, and as such may be expected to



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gradually disappear in the same way most of its kindred have already done." 1 Story Eq. Jur., § 496 a. And the current of modern authority is in accordance with the views indicated by Mr. Justice Redfield. *White's Lead Cases in Eq.*, p. 122 *et seq*; *Harris v. Ferguson*, 2 Bailey 397; *Mills v. Hyde*, 19 Vt. 60; *Strong v. Mitchell*, Id. 644. But whatever views may be entertained elsewhere as to the measure of redress which a court of law can afford to a surety suing his co-surety, the matter has been put at rest in our own State. In *Dodd v. Winn*, 27 Mo. 501, it was held, under the eighth section of the act respecting sureties, (2 Wag. Stat., 1304,) that if a surety pays more than his due proportion of the original demand, and one of the sureties is insolvent, he may recover in an action at law, in the same manner as under like circumstances in equity, and that the meaning of the words "*his due proportion*," is to be gathered from and governed by the particulars of each case. It will be thus seen that we have adopted in this State the equitable rule as to the measure of recovery in actions like the present. That equitable rule embraces within its purview co-promisors or co-debtors as well as co-sureties, and for like reasons, as above stated; for the doctrine of contribution is the result of general equity, on the ground of equality of burden and benefit, and is equally so among principals as among sureties. 1 Madd. Chancery, 235, 236, and note 2; *Fletcher v. Grover*, 11 N. H. 369; *Boardman v. Paige*, Id. 432; Am. Law Reg., vol. 8 (N. S.) p. 455. And the same equitable principle, that of equality of burden, will allow a debtor to recover from his co-debtor whatever the former may have paid in excess of "*his due proportion*," not only of the original demand, but of all costs, &c., necessarily incident thereto. 1 *White's Lead Cases in Eq.*, p. 121; *Wynn v. Brooke*, 5 Rawle 106; *Hayden v. Cabot*, 17 Mass. 169; *Cleveland v. Covington*, 3 Strobbart 184. Holding these views, we regard the cause as having been tried on an erroneous theory, and, there-

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fore, reverse the judgment and remand the cause. All concur.

REVERSED.

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NULSEN V. WISHON *et al.*, Appellants.

**Equitable Titles; PRIORITY: NOTICE.** One who had an equitable title to land gave a deed of trust upon his interest, and afterwards conveyed it to another person upon the consideration of the cancellation of a note due from him to the purchaser, and subsequently his interest was again sold under an execution against him, and was bought by the plaintiff in execution. Pending the proceedings on the execution the first purchaser acquired the legal title. In a contest between the holder of the deed of trust and the other claimants, *Held*, that the former had the best equity as against the purchaser at the execution sale, and that his equity should prevail as against the other purchaser also, if the latter had notice of his claim when he bought. And the latter having acquired the legal title, with notice of the prior equity, as the evidence tended strongly to prove, a decree of the trial court divesting the legal title out of him and vesting it in the trustee in the deed of trust, was affirmed.

*Appeal from Phelps Circuit Court.*—HON. V. B. HILL, Judge.

This was a suit in equity to correct a misdescription in and to foreclose a deed of trust. The suit was brought by Nulsen, Mersman and Seay, against F. M. Wishon, Dodd & Brown and Creusbauer, the latter being but a nominal defendant. The petition set forth that Benjamin Wishon, had the legal title to lot 1, in block 62, of the town of Rolla; that in 1867 he conveyed the same to defendant, Creusbauer, by a deed in which, by mistake, he described the lot as being in block 67; that in 1868 Creusbauer executed to plaintiff, Seay, a deed of trust on the same lot in which he made the same mistake; that this deed of trust was given to secure to plaintiffs Nulsen and Mersman the payment of a note which was due and re-

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mained unpaid; that on May 14th, 1874, Creusbauer, by warranty deed, conveyed this same lot to defendant, F. M. Wishon, by the correct description, part of the consideration being the discharge of plaintiff's deed of trust; that defendants Dodd & Brown, on the 7th day of August, 1874, obtained judgment against Creusbauer, and at an execution sale thereunder on the 5th day of February, 1875, purchased said lot; that on the 8th day of February, 1875, Dodd & Brown obtained a sheriff's deed for the lot, and were then asserting title thereunder; that B. Frank Wishon, executor of Benjamin Wishon, on the 1st day of February, 1875, conveyed the lot to defendant, F. M. Wishon. There was a prayer that the deed of trust be corrected; that the title vested in defendant, F. M. Wishon by the deed from the executor should be vested in plaintiff, Seay, under the conditions of his deed of trust and for a foreclosure of the deed of trust.

Dodd and Brown filed an answer, in which they alleged that the deed from Creusbauer to defendant Wishon was fraudulent as to creditors, and that they purchased without notice of plaintiffs' deed of trust, and asked that said deed of Creusbauer to Wishon be declared void, and that plaintiffs' deed of trust be, as to them, declared without validity, and for general relief. Defendant Wishon filed a separate answer, in which he claimed title to the lot under the deed of May 14th, 1874, against both plaintiffs and Dodd and Brown, and alleged that the consideration for his deed was the surrender of his promissory note, and that he had no notice or knowledge of plaintiffs' deed of trust at the time he received said deed. It was stipulated that all new matter embraced in the several answers should be considered as put in issue by proper replications.

Plaintiff Mersman and defendant Creusbauer were introduced by plaintiffs and their testimony sustained the allegations of the petition as to the debt, and the mistake in the deed and deed of trust. Plaintiffs also introduced one Heintz, whose testimony tended to show that defendant

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Wishon had notice of the deed of trust to them when he took his deed. Dodd and Brown introduced their sheriff's deed and proved they had no notice of plaintiffs' deed of trust. Defendant Wishon testified that he took the lot in payment of \$2,100, and gave up Creausbauer's note which he held for that sum; that he had no notice of plaintiffs' deed of trust, and that the property, when he took it, was not worth more than \$1,500 or \$1,600. The court decreed for the plaintiff.

*L. F. Parker* for appellants, argued that a mistake in description will never be corrected where the rights of a *bona fide* purchaser for a valuable consideration without notice have intervened. 1 Story Eq. Jur., §§ 64 c, 165; *Whitman v. West*, 30 Me. 485; *Ligon v. Rogers*, 12 Ga. 281; and that F. M. Wishon was such a purchaser. *Swift v. Tyson* 16 Pet. 1; *Atkinson v. Brooks*, 26 Vt. 569; *Blanchard v. Stevens*, 3 Cush. 162. But it may be said, though the equities are equal in other respects, (which we deny,) that of the plaintiff is the prior, and the rule is between equities that he who has the prior equity in point of time, is entitled to a like priority in point of right. Yes, and I take it to be a further principle, well established in equity jurisprudence, that when the holder of one of two equities, equal in all respects except as to point of time, by superior diligence, secures in himself the legal title, equity will permit him to retain it, though the one thus diligent may be the holder of the later equity in point of time. Dart's Vendors and Purchasers, 389. Now the legal and equitable title was originally in B. Wishon. The equitable title passed to Creusbauer; thence one equitable title passed to plaintiffs, and another to the defendant Wishon, the legal title remaining in B. Wishon until his death. At his death it vested in his executor, and from his executor the appellant in this suit, the holder of, at least, an equal equity with the plaintiffs' (except as to point of time), pur-

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chased it and should be allowed to enjoy the fruits of his diligence.

*H. B. Johnson* for respondent argued that the relinquishment of the unsecured note by Wishon was no new consideration such as would render him a *bona fide* purchaser, as against a prior equity, the vendor having parted with his right to convey. *Rowan v. Adams*, 1 Smed. & M. 45; *Powell v. Jeffries*, 5 Ill. 387; *Gliniski v. Zawadski*, 8 Fla. 405; *Ruth v. Ford*, 9 Kas. 17. Plaintiffs occupy the same position as they would were they holding under a prior unrecorded deed which correctly described the property. *Rhodes v. Outcalt*, 48 Mo. 367. A judgment creditor who bids in land and pays for it by a credit on the judgment, is not a *bona fide* purchaser for value, in legal contemplation, inasmuch as he parts with no new consideration on the faith of his purchase. *Orme v. Roberts*, 33 Texas 768; *Rollins v. Callinder*, 1 Freem. (Miss.) Ch. 206. And the giving of a note secured by mortgage is not a purchase for value, as equity can relieve against them. *Haughmont v. Murphy*, 21 N. J. Eq. 118; 14 U. S. Dig. Vend. & Pur. 1275; *Jewett v. Palmer*, 7 John. Ch. 65. A *bona fide* purchaser, to be adjudged such, must aver and prove that he paid the purchase money without notice. *Harris v. Norton*, 16 Barb. 264; *Duncan v. Johnson*, 13 Ark. 190; *Kilcrease v. Linn*, 36 Miss. 569; *Williams v. Hollingsworth*, 1 Strobh. (S. C.) 103; *Beaty v. Whitaker*, 23 Texas 526. And the receipt in the deed in not *prima facie*, much less conclusive, evidence of such payment. *Lloyd v. Lynch*, 28 Pa. St. 419; *Mitchell v. Prickett*, 23 Texas 573; *Hamman v. Keigwin*, 39 Texas 34. Creusbauer, at the time he sold to Wishon, had no legal title. All the interest he possessed was an equity. The rules in regard to *bona fide* purchasers apply only to the purchasers of the legal title. The purchaser of an equity is bound to take notice of a prior equity. As between equities the prior one will be enforced. *Vattier v. Hinde*, 7 Pet. 252; *Buchannon v. Upshaw*, 1 How. 56;

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*Hunt's Lessee v. McNil*, 1 Wash. 70; *Oakley v. Ballard*, Hempst. 475; *Boone v. Chiles*, 10 Pet. 177; *Wood v. Mann*, 1 Sumn. 506; *Flagg v. Mann*, 2 Sumn. 486; *Stout v. Hyatt*, 13 Kas. 232; *Pinson v. Ivey*, 1 Yerg. 296; cases cited, 14 U. S. Dig., 59 § 1242; *Dupont v. Wetheman*, 10 Cal. 354; *Chew v. Barnett*, 11 Serg. & R. 389. Wishon is in no better position by reason of the administrator's deed, for under that he would be chargeable with the trust. *Rafferty v. Mallory*, 3 Biss. 362.

HENRY, J.—None of the parties acquired a legal title to the lot in controversy, until the executor of the last will of B. Wishon executed a deed conveying the same to defendant F. M. Wishon. The equity of Dodd, Brown & Co., was acquired after the deed of trust to Seay, as was also that of F. M. Wishon, which he obtained under the deed from Creusbauer.

The equity of plaintiff is to be preferred to that of Dodd, Brown & Co., because prior in point of time, whether Dodd, Brown & Co. had notice of plaintiff's equity or not. It is also to be preferred to that of Wishon, if he had notice of the prior equitable claim of the plaintiffs, whether the law be as insisted by appellants or not, that he is to be regarded as a purchaser for a valuable consideration, a pre-existing debt. We do not deem it necessary to determine that question. It was charged by plaintiffs that Wishon was aware of their equitable right to the property when he purchased the lot of Creusbauer. There was evidence tending strongly to establish that allegation. We cannot say that the preponderance of evidence on that issue was not in favor of the plaintiffs. The court might well have based its decree on that ground, conceding the law to be as understood by appellant's attorney. All that the court decreed was a reformation of the deed of trust in the description of the property, and vesting the legal title acquired by Wishon, the defendant, under the deed from B. Wishon's executor, in Seay, the trustee in the



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trust deed, executed for the benefit of his co-plaintiffs. There was no conflict of evidence in regard to the intention of Creusbauer to convey by that deed to Seay the lot in controversy. The testimony of plaintiff Mersman, and of the defendant Creusbauer, fully proved that intention. All concurring, the judgment is affirmed.

AFFIRMED.

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BROWN V. BROWN'S ADMINISTRATOR, *Appellant*.

1. **Homestead:** WIFE LIVING APART FROM HER HUSBAND. Whilst a marriage *de jure* exists, the husband is the head of a family, although composed only of his wife, who has left him; and although living apart from him at the time of his death, the wife is, under the homestead act of 1865, (Gen. Stat. 1865, p. 449,) where there are no minor children, entitled to the homestead.
2. ———. Where a dwelling house and appurtenances were situated on an eighty acre tract in which the occupant had only a life estate, *Held*, that under the homestead act of 1865, upon his death, the right of homestead in his widow would attach to the remaining part of the farm which was owned by him in fee simple, and that she would be entitled to receive, in fee, a portion not exceeding 100 acres in quantity, nor \$1,500 in value.
3. ———: HEAD OF A FAMILY. Where the owner of a farm rented the same, and occupied but one room in the house, upon an agreed division between himself and his tenant of the profits and expenses, for the purpose of securing to himself the services and attention of the tenant and his family, *Held*, that this did not make the tenant the head of the family, nor deprive the owner of the control over the house previously exercised by him.
4. ———: JURISDICTION OF PROBATE COURT. The probate court having jurisdiction of the estate of a deceased housekeeper, or head of a family, has authority, under the statute, (1 Wag. Stat., § 5, p. 608,) to make the necessary order on an administrator to surrender to the party entitled, the possession of a homestead.

*Appeal from Greene Circuit Court.*—HON. W. T. GEIGER,  
Judge.

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*Simmons & Travers* for appellants.

1. As there was no dwelling house on the land in dispute, it could not constitute a homestead. 1 Wag. Stat., § 1, p. 697; 7 N. H. 245; *Horne v. Tufts*, 39 N. H. 483; *Cook v. McChristian*, 4 Cal. 26; *Charless v. Lamberson*, 1 Iowa 439; 23 Texas 502; 1 Am. Law Reg., pp. 649 to 656, (N. S.); *Franklin v. Coffee*, 18 Texas 415.

2. Respondent having abandoned her husband, and he having rented his house and farm, there was no one dependent upon him for support or under his control; and he was, therefore, neither a housekeeper nor the head of a family, and neither he, in his life-time, nor his wife, after his decease, was entitled to a homestead. *Bowne v. Witt*, 19 Wend. 475; *Woodward v. Murray*, 18 Johns. 400; *Harshaw v. Merryman*, 18 Mo. 106; *Porter v. Bobb*, 26 Mo. 36; *Reese v. Chilton*, 26 Mo. 598.

*H. E. Howell* for respondent.

1. It was not necessary that the building should have been situated upon the land in dispute; they were but a few steps north of it, upon a forty acre tract adjoining. *Skouten v. Wood*, 57 Mo. 380; *Perkins v. Quigley*, 62 Mo. 498; *Thompson on Homesteads*, § 145; *West River Bank v. Gale*, 42 Vt. 27.

2. Hall was not Brown's tenant when Brown died, and if he were, it would make no difference in this case. *Taylor on Land. & Ten.*, (5 Ed.) § 24; *Thompson on Homesteads*, §§ 120, 274.

NAPTON, J.—This was an application to the court of probate and common pleas of Greene county, by the widow of Caleb Brown, asking that 120 acres, owned by her husband in his life-time, but then occupied by his administrator, should be declared her property in fee simple, under the 5th section of the homestead law, as it was in 1865, with a further petition that the administrator be or-

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dered to deliver her possession of the same. This petition was filed in 1876, after the act of March 18th, 1875, but Caleb Brown's death occurred in 1874. The facts upon which this judgment was asked, were proved on the investigation, and are substantially these: Caleb Brown had a house in which he had resided for many years on a tract of land of eighty acres, in which he had merely a life estate, and cultivated portions of 120 acres adjoining, which belonged to him in fee, and which was proved to be worth not over \$8.00 an acre. His children were all grown and married, and did not live with him. His wife, the plaintiff, lived with him on this place for about eight years, and then left him, on account, as she states in her testimony, "of troubles." She afterwards returned to his house, but finally left him. When this last desertion occurred, Brown had on the place a tenant named Hall, and at Brown's request, after his wife left, Hall and his family moved into the house occupied by Brown, and Hall's wife superintended or performed all the services usually devolved on the female portion of the household. Brown only occupied a single room in the house. Hall had a contract with Brown to cultivate the place for another year, upon an agreed division of the profits and expenses, when Brown died only a few months after the final departure of his wife. After his death she was allowed the \$200 authorized under the 33rd section of the 2nd article of the administration act, and the \$400 under the 35th section.

As Caleb Brown died in 1874, the plaintiff's rights are of course to be determined by the law as it was at that date, without regard to changes subsequently made, although made before the commencement of this suit. One of the questions presented by the state of facts is, whether the voluntary abandonment by the plaintiff of her husband, previous to his death, destroyed her right to the homestead, or in other words, whether the husband, without any children, was the head of a family within the meaning of the home-

1. HOMESTEAD:  
wife living apart  
from her hus-  
band.

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stead law, after his wife left him. In the examination of this question we have no precedents in this State to guide to a conclusion, and the statute of 1865 is not without obscurity, however plain may be its general object. The decisions in Texas and New Hampshire, on this point, are in direct opposition to each other, it being held in New Hampshire that while the marital relation exists, the husband still continues the head of a family, though his wife has left him, with or without cause, and there are no children, and in the Texas courts that abandonment by the wife without cause effects a forfeiture of her rights in the homestead. Mr. Thompson, in his work on Homesteads, suggests as an explanation of these apparently conflicting views, that in New Hampshire the wife's interest in the homestead is purely inchoate, resembling dower, whilst in Texas it is a present right depending on the keeping together of the family. Thompson on Homestead, § 75. This explanation is not entirely satisfactory, especially in cases where no creditors are concerned, as is the present, for the Texas court concedes that where the wife leaves for good cause the rule there would be different, and this concession necessarily involves the investigation of a question foreign to the main issue, depending on a great variety of circumstances and difficult of solution. The rule in New Hampshire is certainly recommended by its simplicity and conformity to general principles regulating the marital relation. The application in special cases, like the present for example, may seem to lead to injustice and a departure from the leading object of all homestead exemptions, which is obviously to protect a home for the wife and children, or either. But the prevention of such consequences must be left to legislative action, and we, therefore, conclude that whilst a marriage *de jure* exists the husband is the head of the family though composed only of his wife who has left him, and consequently that the wife, though living apart from him at his death, is, in the absence of any minor children, entitled to the homestead.

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Another point in this case is, that the dwelling house and appurtenances thereto were on the eighty acres in 2 — which Brown had only a life estate, and therefore, upon his death the homestead was gone; at all events that she could only claim the same homestead which the husband was entitled to, and as the entire tract contained 200 acres, and he could not claim beyond 160, without regard to value, her rights, if they did not cease altogether, would be confined to such portion of the 120 acres as would, with the eighty acres on which the house stood, make 160 acres. There is no doubt that whilst Brown was alive his homestead was confined to 160 acres, and, therefore, he could have been obliged to relinquish forty acres in some part of the tract of 200 acres. But we may suppose a case, in which the entire eighty on which his home was built, was entirely washed away by a flood, or otherwise destroyed by some convulsion of the earth, his homestead rights would not be lost by such accident, and as the 120 acres still left would be less in quantity than the statute allowed him, he could have claimed the whole unless it exceeded in value the \$1,500. His widow would succeed to his rights, and the destruction of all title to the eighty acres on which the house stood would operate as effectually so far as she is concerned, as a destruction by water or earthquake. Only 120 acres were left on which she could claim a homestead, altogether less than the quantity allowed by the statute.

It is also insisted that Brown ceased to be a house-keeper after he rented to farm to Hall and he occupied but one room in the house. The tenancy of Hall 3. —: head of a family. did not, we think, divest Brown of his rights. It was simply an agreement to procure Hall's services upon a contract to pay him by a division of the profits. The invitation to him to occupy the house in order to procure the necessary attention to secure Brown's own comfort, did not make Hall the head of the house or deprive Brown of the control over it which he had previously exercised.

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Hall did not cease to be a tenant upon the terms heretofore stated, because he was allowed to take charge of the house and occupy it with his family.

A further objection is made that the action should have been ejectment, to authorize the court to order a delivery of the possession. But this suit is brought under the 5th section of the homestead act, which provides that the "probate court having jurisdiction of the estate of such deceased housekeeper, or head of a family, shall, when necessary, appoint three commissioners to set out such homestead to the person or persons entitled thereto." This statute, it may be observed here, evidently did not have in view a case where the applicant or applicants were not in possession, whilst it is equally obvious that this court (the probate court) was the court to which exclusive jurisdiction over the subject was intrusted. It was clear that no appointment of commissioners was needed to ascertain the value or quantity of the land claimed, and it would have been a useless expense to have made such appointment. The fact that the claimant in this case was not in possession, was a fact not anticipated by the Legislature, and, therefore, was not provided for, but as this court had undoubted authority to ascertain and declare the extent of the homestead, we see no reason why the same court might not make the necessary orders on the administrator to surrender the possession. To deny such authority would be only requiring two suits to effectuate a purpose which might as well be carried out in one. The judgment is affirmed.

AFFIRMED.



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The City of Springfield v. Schmook.

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CITY OF SPRINGFIELD, *Appellant*, v. SCHMOOK.

1. **Streets**—OPENING OF: DAMAGES: MODE OF COMPUTATION. In estimating the damages sustained by the condemnation of property by a city for the purposes of a street, where the whole lot has not been taken, the value of the land taken should be found, and then the increase or diminution in value of the remaining portion; or, the damages may be computed by ascertaining the difference between the value of the entire lot, with improvements, before, and the value of the premises remaining after, the condemnation.
2. ———: ———: EVIDENCE. What other persons have been allowed for their property in the opening or widening of a street, is not competent evidence of the amount of damage sustained by the defendant.
3. ———; ———: EVIDENCE. Where a short time prior to the institution of the proceedings for the widening of a street, the defendant agreed with the city to take a certain sum for a strip of land required for that purpose, and the agreement was not made by way of compromise, nor for the purpose of avoiding litigation, *Held*, that this agreement could properly be considered by the jury as evidence of the value which defendant, at that time, placed upon the strip, and an instruction of that purport asked by the city should have been given.
4. ———: DAMAGES—CONSEQUENTIAL. Consequential damages, in a proceeding to condemn land for the purpose of opening a street, should not be regarded.
5. **Jameson v. City of Springfield**, 53 Mo. 224, distinguished.

*Appeal from Greene Circuit Court.*—HON. W. F. GEIGER,  
Judge.

The instructions asked by plaintiff and refused, and referred to in the opinion, are as follows:

1. In considering the damages (if any) accruing to the defendant from the opening of said street, the jury will not take into consideration any consequential damage, but must consider only the direct and immediate damage to said lot.

2. If the jury believe from the evidence that defendant, Schmook, agreed to take \$100 from the city for the strip of land taken in the opening of Phelps street, and

said agreement, or offer was not made by way of compromise, or for the purpose of avoiding litigation, they will consider such fact as evidence of the value that defendant, Schmook, at that time, placed upon said strip of land.

3. That in considering the amount of damage (if any) defendant has sustained in the opening of said street, the jury are not to take into consideration any special use or purpose to which said property is or has been appropriated; nor will they take into consideration any supposed injury to defendant's trade or occupation; nor any alteration that the opening of said street may have made in his supposed convenience, but will consider solely the actual value of the lot for all purposes, both before and after the opening of said street, deducting what special advantages (if any) accrue to said lot by the opening of said street.

*Bray & Cravens* for appellant.

*F. S. Heffernan* for respondent.

HOUGH, J.—This was a proceeding, on the part of plaintiff to condemn a portion of the defendant's property for the purpose of a street.

The proceedings are admitted to have been regular, and the only questions before us relate to the measure of damages. In order to determine the damages sustained, where the whole property has

1. STREETS—opening of: damages: mode of computation.

not been taken, the effort should be to find the value of the land taken, and then to determine how much the land left was increased or diminished by reason of the appropriation. *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491, or the process may be varied by ascertaining the difference between the value of the defendant's lot together with all improvements upon it, before the strip was taken and the street opened, and the value of the premises without the strip taken, after the opening of the street. Either of these modes of computation will give the person whose property is taken, the value of his land taken, and

any direct and special damages which may result to him by reason of the taking of the same, diminished by the amount of any special benefit which may accrue to him by reason of the improvement. Speculative, remote and consequential injuries and benefits are not to be allowed. Only those injuries and benefits are to be considered which are peculiar to the person whose property is taken, and are such as pertain to the ownership, use and enjoyment of the particular parcel of land, a portion of which is taken. Cooley's Con. Lim., (3 Ed.) 566.

We do not think it was competent for the defendant to show what other persons had been allowed for their  
2. — : — : property, in order to establish the amount of  
evidence. his injury by comparison. The assessment of damages in the other cases may have proceeded upon incorrect principles, or the amount paid may have been the result of contract and in excess of the true value. Such a mode of inquiry was improper, because it furnished no accurate standard for estimating the defendant's damages, and was likely to lead to the introduction of many collateral issues. *Mayor of Lexington v. Long*, 31 Mo. 369.

The chief error committed by the court below was in refusing the second instruction asked by the plaintiff. It  
3. — : — : was in evidence that the council appointed  
evidence. a committee to confer with the property owners affected by opening the street, and that defendant told one of the committee the city could have the strip taken in the present proceeding for \$100. This statement, if not made by way of compromise, or for the purpose of avoiding litigation, could properly be considered by the jury as evidence of the value which the defendant, at that time, placed upon the land taken, and the jury should have been so instructed. Though the precise date of this statement is not given, the circumstances attending it show that it must have been made a short time prior to the institution of the present proceeding.

The first instruction, which told the jury to disregard

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all consequential damages, might very properly have been given, as the defendant stated that his consequential damages would amount to more than \$100.

4. —: damages  
—consequential.

The third instruction was properly refused. It does not conform to the rule laid down in *Mississippi River Bridge Co. v. Ring*, 58 Mo. 496, and announced by us in this opinion. The purport of the decision in *Jamison v. City of Springfield*, 53 Mo. 224, cited in support of the third instruction, has been misconceived by counsel. That was an action of trespass, and the court said that by adopting that form of action the plaintiff consented to the public use of his land for the purpose of widening the street, which carried with it his consent to the inconvenience which the widening of the street would be to his other property, and that the measure of damages in such cases is the fair and reasonable value of the land taken. That rule is inapplicable to the present case.

For the errors indicated, the judgment of the circuit court will be reversed and the cause remanded. All concur.

REVERSED.

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TAYLOR, Plaintiff in Error, v. ATLANTIC & PACIFIC RAILROAD COMPANY.

**Change of Venue:** JURISDICTION. Plaintiff brought suit in the circuit court of Phelps county for damages sustained by the obstruction of a water-course. On the application of defendant, the suit was removed to the circuit court of Dent county. After the filing of the transcript in the latter court, an order was there made returning the transcript to the first court. In that court defendant appeared and filed a motion to strike out a part of plaintiff's replication, which was sustained. Thereafter, on plaintiff's motion, the

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cause was removed to the circuit court of Crawford county, where, after the filing of the transcript, and on motion of defendant, the suit was dismissed for want of jurisdiction; *Held*, error.

*Error to Crawford Circuit Court.*

*Botsford & Williams* for plaintiff in error.

NORTON, J.—This suit was instituted in the Phelps county circuit court at its February term, 1874, to recover \$6,000 damages alleged to have been sustained by plaintiff from the act of defendant in obstructing a water-course, whereby the land of plaintiff was overflowed and damaged. Defendant appeared and filed answer, to which plaintiff replied. Afterwards, at the February term, 1875, on the application of defendant, a change of venue was awarded to the Dent county circuit court. A certified transcript was filed in the latter court in March, 1875, and at the April term thereof, 1875, the court made the following order: "Ordered by the court that the transcript in this case be returned to Phelps county." At the August term, 1875, of the said Phelps county circuit court, defendant appeared and filed his motion to strike out parts of plaintiff's replication, which, by consent, was taken up and sustained. At the same term the venue of the cause was changed, on the application of plaintiff, to the circuit court of Crawford county, in which latter court a certified transcript was filed on the 18th day of September, 1875, and also a motion by defendant to dismiss the suit on the ground that the court had no jurisdiction of the subject matter of the suit. This motion was sustained, and the suit dismissed, and it is from this action of the court that the plaintiff prosecutes his writ of error.

The Phelps county circuit court had undoubted jurisdiction of the parties and subject matter, as shown by the uncontradicted statement of the petition that defendant's road ran through said county, the service of the summons on defendant's agent in said county, and the subsequent

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appearance of defendant to the action. *Dixon v. Hann. & St. Jo. R. R. Co.*, 31 Mo. 409; *Rippstein v. Ins. Co.*, 57 Mo. 86. It is also clear that the order of the said circuit court changing the venue of the cause to the Dent county circuit court, invested it with jurisdiction. The only question arising on the record is, as to the sufficiency of the order of the latter court, directing the return of the transcript to Phelps county, to reinvest the circuit court of that county with jurisdiction. Wag. Stat., sec. 4, provides that when parties agree in writing, duly filed, upon another county to which they desire a cause to be removed, it shall, by order, be removed accordingly. \* \* In the absence of anything to the contrary, we think the presumption may be indulged that the order by the Dent circuit court was made by the agreement of parties. This presumption is supported by the fact that both parties appeared after the return of the transcript to the Phelps circuit court and defendant filed his motion to strike out parts of replication, which was taken up and being confessed by plaintiff, was sustained. This may be regarded as a waiver of any irregularity or informality in the order of the Dent circuit court. *Powers v. Browder* 13 Mo. 154; *Gilstrap v. Felts*, 50 Mo. 428; 61 Mo. 373; 55 Mo. 534; 59 Mo. 364; 49 Mo. 282.

The Phelps circuit court thus having jurisdiction, the order changing the venue to the Crawford circuit court gave the latter jurisdiction, and the dismissal of the suit on motion, without a trial of the issues tendered as to the failure of plaintiff and defendant to agree upon damages, and ten days of the condemnation proceedings, was erroneous. These questions, as issues in the case, were properly triable by jury, or by the court when a jury was waived and not on a motion to dismiss.

Judgment reversed and cause remanded, with the concurrence of the other judges.

REVERSED.



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Leeper v. Baker

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LEEPER, *Appellant*, v. BAKER.

1. **Constructive Adverse Possession, WHEN NOT ESTABLISHED.** Where plaintiff's documentary title to a forty acre tract of land was better than that of the defendant, who, however, claimed such tract under a deed conveying the same and an additional tract of 651 acres, of which latter tract 600 acres had been inclosed by defendant and those under whom he claimed, for more than ten years prior to the commencement of the action; *Held*, that the actual occupation of the 651 acre tract did not, of itself, draw to it such a constructive adverse possession of the forty acre tract as would, under the statute of limitation, defeat plaintiff's better title to the same.
2. **Adverse Possession.** Where, however, evidence was given that such forty acre tract was literally swamp land and unfit for cultivation, with the exception of a few acres for the clearing and cultivating of which plaintiff would not have been compensated, and was only valuable for the timber upon it, and was incapable of being fenced without risk of having the fence washed away by high water; that defendant and those under whom he claimed, had paid taxes on it for more than ten years, and had used it, as incident to the 651 acre tract, to supply himself with rails and house-logs, and to water his stock at a pond thereon; that he had included it in a survey of the 691 acres made by him on the premises, and had duly recorded his deed for the entire tract; that plaintiff lived only eight miles from the land, and had notified defendant about the beginning of his occupancy that he owned the forty acre tract; and, from the evidence, it was fair to presume that plaintiff was aware of defendant's claim to the same; *Held*, that a finding, under proper instructions as to adverse possession, in favor of the defendant, was not without evidence in its support, and that the judgment thereon should be affirmed.

*Appeal from Livingston Circuit Court.*—HON. E. J. BROADBUSH,  
Judge.

*Shanklin, Low & McDougal* for appellant.

1. To constitute adverse possession, two facts must concur: 1st, There must be an entry, under color of right, claiming title hostile to the true owner and the world. 2nd, That entry must be followed by possession, and appropriation of the premises to use, publicly and notoriously, so that other claimants may take notice, and others may

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be cognizant of the fact. *Dixon v. Cook*, 47 Miss. 220, 226; *Turner v. Hall*, 60 Mo. 271.

2. Defendant's possession of the farm under a deed conveying the whole tract of 691 acres, gave him at most only constructive possession of the tract in controversy, as against persons not having title. The constructive possession of the true owner is preferred to the constructive possession of one who has no title. *Griffith v. Schwenderman*, 27 Mo. 412.

3. The acts of ownership exercised over the land by defendant did not constitute actual, open, notorious and continuous possession. In the language of Bliss, J., in *Musick v. Barney*, 49 Mo. 464, "Suppose the owner had visited the land \* \* would he have seen such evidence of possession by another as to warn him that his title was slipping away from him? And if so, was there anything to notify him as to who was the claimant? He might have seen that timber was cut, but this of itself shows only a trespass, unfortunately too common to be regarded as evidences of a claim of ownership. The payment of taxes is an act of ownership, the strongest shown by the defendant, and had it been accompanied by any improvement of the property, would have greatly aided the claim."

4. Mere acts of ownership, as distinguished from actual occupation, are not sufficient to impart notice to the true owner of an adverse claim. "The late decisions of this court certainly manifest no disposition to multiply those evidences of adverse possession, which tend to give it a constructive character." *Turner v. Hall*, 60 Mo. 271. Adverse possession is not to be made out by inference, but by clear and positive proof, and the possession must be such as to show clearly that the party claims the land as his own, openly and exclusively. *Jackson v. Berner*, 48 Ill. 203, 208.

*Pollard & Chapman* for respondent.

1. *Pedis possessio* is not necessary in order to defeat an action of ejectment; neither is a fence, building or other improvement necessary or essential to constitute adverse possession. Acts of ownership under color of title and claim of right, visible, are sufficient; and the nature of these acts of ownership must depend on the uses of which the land is capable. *Turner v. Hall*, 60 Mo. 271; *Draper v. Shoot*, 25 Mo. 197.

2. An entry upon the cultivated portion of a farm, under a deed to the farm, the payment of taxes upon the whole, and such acts of ownership over the unclosed portion for more than ten years as a man ordinarily exercises over the same, will give a constructive *seizin* of the whole tract to which the title extends, unless the person having the better title was within ten years in the actual possession of such part not actually occupied by the dis-seizor. *Fugate v. Pierce*, 49 Mo. 441.

NAPTON, J.—This ejectment was brought in December, 1875. It was conceded that the plaintiff had the better title, and the only defense relied on was the statute of limitations. The forty acres in dispute belonged, in 1856, to Livingston county, as swamp land, and was agreed to be conveyed to one Craig upon his payment of eighty per cent. of the purchase money, twenty per cent. of it having been paid at the date of the agreement. This title of Craig was assigned to the plaintiff in 1860, and in 1866 the plaintiff received a deed from the county. In 1860, but subsequent to Craig's assignment to plaintiff, Craig conveyed his farm containing 651 acres, 600 acres of which were under fence, together with this forty acre tract now in dispute, to a trustee to secure certain debts named in the deed. Upon the foreclosure of this trust by a sale in 1863 or 1864, the defendant's father-in-law purchased the entire tract of 691 acres, and obtained a deed from the sheriff,

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and the defendant entered and took possession of the place in the spring of 1865, and made use of this forty-acre tract to supply himself with rails and house-logs, and watered his stock at a pond which was on it, and paid the taxes on it from 1864 to the trial. It appeared from the testimony at the trial that the land was unfit for cultivation, and that it could not be fenced up without the risk of its being washed off by high water. The plaintiff himself, who lived about eight miles off, testified on the trial: "I notified defendant about the time he took possession of the farm, that I owned the forty in dispute."

The first question presented by the testimony is, whether the actual occupation, under inclosure, of the 600 acres of land by the defendant, will of itself draw to it a constructive possession of the forty acres embraced in the same deed; and

1. CONSTRUCTIVE  
ADVERSE POSSES-  
SION, when not es-  
tablished.

if not, whether it will, in connection with the exercise of the usual acts of ownership over the forty, to which there was a better outstanding title, constitute such an adverse possession as will protect him under the statute of limitations. The first point has been considered and decided by this court in several cases. They are chiefly cases in which New Madrid locations, under the act of 1815, were laid on portions of the St. Louis or St. Charles commons, thereby covering one or more common field lots to which the title originated under the act of 1812. The cases of *McDonald v. Schneider* and *Griffith v. Schwenderman*, 27 Mo. 405, 412, are cases of this character. In the former it is observed by Judge Scott, who delivered the opinion of the court: "Although it is a rule that he who is in possession of a part of a tract of land, having title thereto, is adjudged by the law to be in the possession of the whole of it; and although it is a rule that where possession is mixed, or where two persons possess adjoining tracts, and their possession conflicts or interferes the one with the other, the legal possession is adjudged to be in him who has the better title; for, as both cannot be seized, the pos-

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session follows the title; yet, if he who has the inferior title enters upon the interference, and actually occupies it adversely to him who has the better title for a sufficient length of time, he will acquire a title against the true owner by limitation, as to the portion actually occupied, although the true owner may be in actual possession of that portion of his tract which is not covered by the interference." This proposition, however, so far as it applies to the case we are considering, is stated more clearly by Judge Ewing in the subsequent case of *Schultz v. Lindell*, 30 Mo. 319, in these words: "Where a large tract embraces several smaller ones, a *pedis possessio* of a few acres (or many acres) by one setting up title to the larger tract, claiming the whole, would not be a defense against a superior title in any one of the smaller tracts. There is, in such case, no ouster of the owner of the smaller tract, because the possession being of a part of the larger tract not included in his, is not adverse to him; and the constructive possession following his title will prevail against any other but an actual possession. Where, however, the rightful owner of one of the smaller tracts is not in possession, and the claimant of the larger one enters upon and incloses a part of the former, and continues in possession for twenty years, claiming the whole, he would not be confined to the part actually occupied, but his possession would be construed to be co-extensive with the boundaries of the deed." There is no inconsistency in these opinions. In the first case there were conflicting possessions, and in the last no possession by the owner of the smaller tract. These cases were followed by the case of *Tayon v. Lader*, 33 Mo. 209, in which the following instructions were approved: "To defeat the plaintiff's title by the statute of limitations, it is not sufficient for the defendant to show that N. P. Taylor had possession of part of the land included within the New Madrid location given in evidence for more than twenty years next before the commencement of this suit, but the defendant must go farther, and show

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that said Taylor had actual and exclusive possession of some portion of the forty arpens claimed by the plaintiffs under Bequette for twenty years or more before this suit was commenced." "And if the jury believe from the evidence that defendant, and those under whom he claims, entered on the land in contest, and took actual possession of the same, claiming the same in good faith, as their property, by well defined and marked boundaries, inclosing, cultivating and improving the same, &c., which entry, inclosure, &c., was open, notorious, adverse and continuous, &c., they must find for defendant." It is obvious from these decisions that defendant's actual occupancy of the farm of 651 acres, under a deed conveying 691 acres, did not necessarily defeat the plaintiff's title to the forty acres, although the forty acres was included in the deed, if there was no adverse possession of any part of the forty acres.

So that the principal and decisive question is, in this case, was there such adverse possession of the forty acres

in dispute, continued for ten years, as will defeat the plaintiff's rights under his superior title. As has been said in numerous cases, both in this State and elsewhere, adverse possession under the statute of limitations is a subject not susceptible of very definite explanation. It depends somewhat on the circumstances of each case, but the general rules which may be extracted from the multitude of cases on the subject, seem to be sufficiently definite for the guidance of courts in their application to the variant features developed in each particular case as it arises. The words "actual occupancy" are themselves indefinite in their meaning, for although they are usually applied to a case of residence on the land, or to an occupation by fences or buildings, they are not necessarily restricted to such marks of occupation, but may be applied to other acts of ownership which are known to the true owner. In the present case the forty acres in controversy was literally swamp land, and only valuable for the timber on it. There were some acres of it which could have been

2. ADVERSE POSSESSION.



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cultivated, but an owner of 600 acres of land in cultivation and pasture, would hardly have gone to the expense of clearing such few acres and cultivating it, and a fence inclosing the whole of the forty acres would have been liable to be washed away. The defendant, who claimed under a deed including it, simply used it to get logs and rails from it. In the survey of the entire tract of 691 acres, which he had made, the forty acre tract was included. He paid taxes on it from 1864. The plaintiff, it appears, advised him in the spring of 1869 that he owned it. Why this advice was given does not appear, but as the plaintiff lived in the neighborhood, it is fair to presume that he was aware of the claim of defendant to the 691 acres which was conveyed by deed duly recorded. Upon this testimony the court, at the instance of plaintiff, gave the following instructions:

5. While it is true that in some cases actual occupation is not indispensable, still its absence must be supplied by some act or acts of ownership done on or about the land that will give notice of an adverse claim to the owner by visitation and inspection of the land, and if the court finds that defendant, Baker, for years at a time exercised no visible acts of ownership on the land, so that upon inspection no vestige of an adverse occupation remained upon the land, then the cutting of house-logs and the making of rails at three different times in a period of ten years, cannot and do not constitute such an adverse occupancy of the tract in controversy as will defeat the legal title of plaintiff read in evidence.

6. To constitute an adverse occupancy of the tract in controversy, the court must find that the possession of defendant, and those under whom he claims, was, for ten years next before the commencement of this suit, notorious, that is, generally known by those residing in the neighborhood, and that it was an open, visible and exclusive possession, accompanied by such acts of ownership as would enable any one upon a visit to and inspection of the

land to see that some person or persons held it in actual possession. And also the following for defendant :

8. A fence, building or other improvement is not essential to constitute an adverse possession. Acts of ownership, under a claim of right, visible, are sufficient to authorize the court to find such possession; and the nature of these acts of ownership must depend on the uses of which the land was capable. These instructions are clearly in conformity to repeated decisions of this court. *Draper v. Shoot*, 25 Mo. 203; *Fugate v. Pierce*, 49 Mo. 441; *Musick v. Barney* 49 Mo. 458; *Turner v. Hall*, 60 Mo. 271; *Key v. Jennings*, 66 Mo. 356, and the verdict on them must have been based on the conclusion from the evidence that the acts of ownership exercised in this case were "visible," and such as upon inspection would advertise the owner of an adverse claim. In *Draper v. Shoot*, it was held that to constitute an adverse possession there need not be a fence, building or other improvement made, and that it suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by the statute; that much depends upon the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule in all cases, but that it may safely be said that where acts of ownership have been done on land, which from their nature indicate a notorious claim of property in it, such acts are evidence of an ouster of a former owner, and an actual adverse possession, provided the property was not susceptible of a more strict or definite possession. Under this view of the law, which was clearly explained by the instructions on both sides given by the court, it cannot be maintained that the verdict was without evidence. Had the court qualified the instruction given for defendant by requiring the acts of ownership to have been exercised with the knowledge of the adverse claimant, the propriety of the verdict would have been more obvious, as there

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was undoubtedly evidence tending in that direction. It seems that an interview with defendant was sought by plaintiff at the very beginning of his occupancy of the farm, and that he advised the defendant, at that interview, of his claim to the forty acre tract. It is not unreasonable to suppose that the defendant was not silent as to his claim under the Craig deed. The plaintiff, in truth, had no legal title at that time, and it was not till 1866 or 1867, that the county conveyed to him, and the only probable cause of his delay in bringing suit was the mistaken assumption that the statute could not run against the county. Judgment affirmed.

AFFIRMED.

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THE STATE V. TESTERMAN, *Appellant*.

1. **Indictment**: ELECTION BETWEEN COUNTS. An indictment contained two counts, one of which charged a third party with shooting and killing the deceased, and the defendant with being present aiding and abetting, and the other charged defendant with killing the deceased by cutting him with a knife, and the third party with being present aiding and abetting; *Held*, that the trial court committed no error in refusing to require the prosecutor to elect on which of said counts the defendant should be tried.
2. ———. A count in an indictment alleged that of the wounds inflicted upon him, the deceased "languished and languishing, immediately did die;" *Held*, that this was an insufficient allegation as to the time and place of the death of the deceased.
3. **Indictment in Several Counts**: VERDICT. A verdict will not be disturbed because it does not specify the count under which the defendant was found guilty, when it is supported by one good count in the indictment.
4. ———: EVIDENCE. Evidence in relation to the time and place of the death of the deceased, admissible under one count of an indictment, is not rendered inadmissible because the allegation as to such time and place in another count is insufficient.
5. ———: WITNESS, RULES OF EXAMINATION WHEN DEFENDANT IS WITNESS. The defendant in a criminal case, when he testifies in his

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own behalf, occupies the position of any other witness, and subjects himself to just as searching a cross-examination; and the prosecuting attorney has the same right to comment upon his testimony as on that of any other witness.

6. —: EVIDENCE. A previous difficulty between deceased and third parties had occurred about 10 o'clock on the morning of the same day that deceased was killed, at which defendant was not present, but there was evidence tending to show that he was aware that there had been a difficulty and had espoused the quarrel of such third parties; *Held*, that evidence of such former difficulty was admissible.
7. —: RES GESTAE. Evidence of the cutting by defendant of a third party, participating in the same fight in which deceased was killed, is admissible as part of the *res gestae*.
8. —: MURDER IN THE SECOND DEGREE. If an intentional killing is shown, but circumstances of malice and premeditation are not proved, the law presumes the killing to be murder in the second degree.

*Appeal from McDonald Circuit Court*—HON. JOSEPH CRAVENS,  
Judge.

C. W. Thrasher and H. C. Young for appellant.

In this indictment a different and distinct felony of the same grade is charged in each count.

The first count charges that Arnol Stultz shot in the back and killed deceased with a pistol, and that defendant and Carver were present, aiding and assisting him in the killing.

The second count charges that defendant stabbed and cut in the breast and killed deceased with a knife, and that Stultz and Carver were present aiding him in the killing. And although it may be said that both counts in effect charge each of said defendants as principal, still each count charges a distinct and different killing, done in a different manner and by different means. And the fact that both charge the killing of the same person on the same day, does not connect in any way the two felonies charged, or make one the part of the other. This defendant could not proceed to trial on both these counts at once, without be-

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ing greatly prejudiced by the confusion of the evidence necessary to support both at the same trial. Where the offenses charged in different counts of an indictment are distinct and different felonies, the trial court should compel the prosecutor to elect upon which count he will proceed at the trial. 1 Wharton's Crim. Law, (5 Ed.) § 416; 2 Russell on Crimes, (8 Am. Ed.) 773, marginal p. 774; 1 Bishop on Crim. Procedure, § 208; 1 Chitty Crim. Law, 253; *State v. Porter*, 26 Mo. 201; *State v. Jackson*, 17 Mo. 544; *Storrs v. State*, 3 Mo. 9; *State v. Kibby*, 7 Mo. 317; *Baker v. State*, 4 Pike 56; *Kane v. People*, 8 Wend. 203; *People v. Rynders*, 12 Wend. 425; *State v. Nelson*, 8 N. H. 163; *State v. Coleman*, 5 Port. 32. The court below erred in requiring the defendant to answer the question asked by prosecuting attorney and objected to by defendant, and in permitting said prosecuting attorney, against the objection of defendant, afterwards to comment to the jury upon such question and answer. A person accused may waive his privilege to testify on his own behalf, without prejudice; and if he does testify he is at liberty to stop at any point he may choose. Cooley's Const. Lim., 317. No person shall be compelled to testify against himself in a criminal cause. Const. of Mo. 1875, art. 2, § 23; Cooley's Const. Lim., 317, and 317 note. The error complained of is not alone that the court permitted the prosecuting attorney to comment on the testimony of defendant, but that the court compelled defendant, against his objection, to give evidence against himself, and then permitted the prosecuting attorney to comment on the evidence so unlawfully obtained. The act of the General Assembly cannot deprive a person of rights secured to him by the organic law of the State. 1 Kent's Com., 448; *Bailey v. Gentry*, 1 Mo. 164; *Brown v. Ward*, 1 Mo. 209; *Baumgardner v. Circuit Court Howard Co.*, 4 Mo. 50; *French v. Woodward*, 58 Mo. 66; *County Court St. Louis Co. v. Griswold*, 58 Mo. 175; *St. Joseph Board Public Schools v. Patten*, 62 Mo. 444; *State v. Curators State University*, 57 Mo. 178.

If a person accused can, under any circumstances, be compelled to answer a question upon cross-examination, he certainly cannot be compelled to answer a question beyond the subject matter upon which he has been examined in chief, for that would be compelling him to become a witness for the prosecution against himself. *People v. McGungill*, 41 Cal. 430; *State v. Harrington*, 5 Cent. Law Jour. No. 7, p. 154; Const. of Mo. 1875, art. 2, § 23; Cooley's Const. Lim., 317.

The third instruction entirely ignores the law of excusable or justifiable homicide, and the necessity of proving malice to constitute the crime of murder, and in effect charges the jury that every killing done intentionally, by means of a dangerous weapon, without deliberation and premeditation, the law presumes to be murder in the second degree; and must have misled the jury as to the facts necessary to constitute murder in the second degree. As the law makes no such presumption, unless on all the evidence it appears there was no justification, excuse or palliation, this instruction, without such qualification, is too broad, and tended directly to mislead the jury as to what constitutes murder in the second degree. *State v. Underwood*, 57 Mo. 49; *State v. Holme*, 54 Mo. 163. It is only the duty of the trial court to define, by proper instructions to the jury, what constitutes the different degrees of murder under our statute, together with the meaning of the technical words "malice," "willfully," "deliberately" and "premeditatedly," and then leave the jury to find from all the facts whether either exists in a particular case. The law presumes none of the elements of crime to exist until established by evidence; the presumption being that every man is innocent until the contrary appears. And it is no more a presumption of law nor a matter for the court to decide that malice exists in any particular case, than that any other fact necessary to constitute the crime of murder exists in the same case. What facts are established by the evidence is a matter for the jury in every case, and not for



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the court. Without malice there can be no murder in any degree. 1 Chitty Crim. Law, 243; 1 Bishop on Crim. Law, (6 Ed.) § 429; 1 Bishop on Crim. Pro., § 58; *State v. Philips*, 24 Mo. 486; *State v. Lane*, 64 Mo. 319; *State v. Wieners*, 66 Mo. 13.

*J. L. Smith*, Attorney-General, for the State.

It is true, under the constitution, no man can be compelled to bear witness against himself, but when he voluntarily takes the witness stand in his own behalf, he waives his constitutional right, and is subject to the rules of examination and cross-examination applicable to other witnesses, and may be impeached and contradicted the same as any other witness. *Fralich v. People*, 65 Barb. 48; *Fletcher v. State*, 49 Ind. 124; *Mershorne v. State*, 51 Ind. 14; *Connors v. State*, 50 N. Y. 242; *Stover v. People*, 56 N. Y. 315. The rule in relation to the cross-examination of witnesses, in this State, is that when a witness is called by one party, he can be cross-examined as to the whole case by the other party. *St. Louis & Iron Mountain R. R. v. Silver*, 56 Mo. 265; *State v. Sayers*, 58 Mo. 585.

HENRY, J.—Defendant Arnol Stultz, and Andrew Carver, were indicted for the murder of Winfield Scott Painter, and at the October term, 1873, of the McDonald circuit court, defendant was tried and convicted of murder in the second degree, and his punishment assessed at ten years imprisonment in the penitentiary. The indictment contained two counts. The first count charged that Arnol Stultz shot and killed the deceased, and that defendant and Andrew Carver were present, aiding and assisting. The second charged that Testerman killed the deceased by cutting him with a knife, and that Stultz and Carver were present, aiding and assisting. The defendant moved the court to compel the State to elect on which of said counts she would try the defendant. The court overruled the motion, and this is complained of as error.

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In the *State v. Porter*, 26 Mo. 202, NAPTON, J., delivering the opinion of the court, said: "If the several counts refer to different transactions, in point of fact, it is matter of discretion with the court to compel the prosecutor to elect upon which count he will proceed, and the power ought to be exercised in cases where the offenses are distinct and of a different nature, and calculated to confound the defense." Again, "It is usual to frame several counts, where only a single offense is intended to be charged, for the purpose of meeting the evidence as it may transpire at the trial; and in such cases the court will not compel the prosecutor to elect." Here, in both counts, Testerman was indicted for murder in the first degree. He who kills, and he who is present, aiding and abetting, are equally guilty and punished alike; and if the latter is indicted as the actual perpetrator, the indictment is good, and is supported by proof that he was present, aiding and abetting. *State v. Davis*, 29 Mo. 396; *State v. Philips*, 24 Mo. 475; Chitty's Crim. Law, 256. It was no error, therefore, to refuse to require the prosecutor to elect.

The second count of the indictment is defective in failing to state when and where the deceased died. It alleged that of the wounds inflicted upon him, the deceased "languished and languishing did immediately die." This has been repeatedly held an insufficient allegation as to the time and place of the death of the deceased. *Lester v. State*, 9 Mo. 658; *State v. Sides*, 64 Mo. 383; *State v. Lakey* 65 Mo. 217; *State v. Mayfield*, 66 Mo. 125.

The verdict did not specify under which count defendant was found guilty, and it is contended by appellant's counsel that, therefore, it cannot stand; but it has so often been held that if the indictment contain one good count which will support the verdict, it will not be disturbed, that it is unnecessary to dwell upon that point.

The defendant, at the trial, objected to the introduc-

1. INDICTMENT:  
election between  
counts.

2. INDICTMENT - IN  
SEVERAL COUNTS:  
verdict.

tion of any evidence in relation to the time and place of  
 4. —: evidence the death of the deceased, because not sufficiently alleged in the second count, but as this evidence was admissible under the first count, the objection was not well taken. As under the decisions in the *State v. Davis* and *State v. Philips*, before cited, the evidence admitted on the trial would have supported either count, the objection to its introduction because one count was bad, is untenable.

The defendant complains that on the cross-examination of defendant, who was introduced as a witness in his own behalf, and testified in chief that Sam. Smith did not run away during the fight, the court compelled the defendant to answer the following question: "Did you not tell Dr. A. W. Chenowith, one night when you went there with a double-barreled shot gun, that Sam. Smith was frightened worse than you ever saw a man before, and at the commencement of the fight ran away eighty or a hundred yards?" To which he answered, "I did." Sam. Smith was a witness for defendant. The prosecuting attorney, in his opening argument to the jury, assumed that Smith was not present during the difficulty, and to support that assumption, was permitted by the court, defendant objecting, to comment on the question propounded to the defendant, and his answer. The action of the court was proper. Defendant, when he places himself on the stand as a witness, occupies the position of any other witness, and subjects himself to just as searching a cross-examination. *State v. Clinton*, 67 Mo. 380. And the prosecuting attorney had the same right to comment upon his testimony as he had to remark upon that of any other witness in the cause.

The court, against defendant's objection, admitted evidence of a previous difficulty between the Painters and  
 5. —: witness, rules of examination when defendant is witness  
 6. —: evidence. Carver and Stultz, which occurred about 10 o'clock on the morning of the same day that Winfield S. Painter was killed. After that difficulty the parties separated, the Painters leaving the place where the fight oc-

current to go to a bathing place on the creek, and after bathing, they started homeward through a cornfield. When they had proceeded a short distance, they saw defendant and Carver and Stultz meeting them. It seems from the evidence that defendant had heard the noise of the first difficulty, but was not present. He was on the other side of the creek, but crossed over to where Stultz and Carver were. Carver carried with him, into the cornfield, two stones in his hands. Although not present at the first difficulty, there was evidence tending to show that defendant was aware that there had been a difficulty, and had espoused the quarrel of Stultz and Carver. The evidence of the former difficulty was, therefore, admissible.

It is further objected that the court admitted evidence that during the progress of the fight in the cornfield, the *res gestae* defendant cut George Allen Painter with his knife. It was one fight, in which, from the evidence, all the parties present were participants, and the evidence objected to was a part of the *res gestae*.

The third instruction, it is insisted, is erroneous. It declares that: "If the jury find that Stultz and Carver, 8. —: murder in the second degree or either of them, willfully killed Painter by shooting him with a pistol or cutting with a knife, and that defendant was willfully present, aiding, abetting, assisting or encouraging the same, or if they find that defendant, with his own hands, willfully cut and stabbed Painter, and thereby killed him, but that said killing was not done with deliberation and premeditation, such killing would be murder in the second degree." The objection urged to this instruction is, that it ignores the law of excusable or justifiable homicide, and the necessity of proving malice to constitute the crime of murder. There is some plausibility and force in this objection, but this instruction was given as a qualification to others given in regard to murder in the first degree, in which the court declared that to constitute the killing murder of that degree, it devolved upon the State to show that it was done

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with premeditation and deliberation; and that the law presumed malice where there was an intentional killing, in the absence of extenuating circumstances. Without malice, it is true, there can be no murder in either degree, but it has been very often held by this court, that the law presumes malice from an intentional killing in the absence of evidence excusing, justifying or mitigating the offense. If an intentional killing is shown, but circumstances of malice and premeditation are not proved, the law presumes the killing to be murder in the second degree; *State v. Underwood*, 57 Mo. 49; *State v. Holme*, 54 Mo. 53. The judgment of the circuit court is affirmed. All concurring.

AFFIRMED.

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SIMMONS V. CARRIER, *et al.*, Appellants.

1. **Evidence:** OPINIONS. A carpenter, engaged in buying lumber and building houses, may testify as to the cost of lumber in a house, his opinion having been formed by a comparison of it with certain lumber furnished by him for another house.
2. **Amendments.** The answer to a petition for a money judgment and to enforce a mechanic's lien averred that the sum sued for was not due at the filing of the answer, nor on the 6th day of January, 1872. On the second trial of the case, the defendant asked leave to amend by averring that the sum was not due when the action was commenced, which was refused; *Held*, no error.

*Appeal from Henry Circuit Court.*—HON. F. P. WRIGHT,  
Judge.

The facts of this case will be found in a former report in 60 Mo. 581.

The following are the instructions given and refused on the second trial. On the part of plaintiff the court gave the following instructions:

1. If the jury believe from the evidence that the

plaintiff furnished the lumber in question to Carrier, as contractor under the other defendants, to be used in the erection of the building mentioned in the petition, and that the same was so used by said Carrier, and that the plaintiffs did file the lien stated in the petition, then the plaintiffs are entitled to a judgment for the value of the lumber so furnished, less the amount paid thereon, if any. And whether or not defendant Roberts paid said Carrier therefor is no defense in this action.

2. The court instructs the jury that although they may find from the evidence that the plaintiff has unintentionally failed to enter the full amount of credits in his accounts filed with his statement of his lien, yet they will find for plaintiffs in such sum as the evidence shows remains now due and unpaid on plaintiffs' account.

3. If the jury believe from the evidence that Carrier received from Roberts the \$500 in controversy, and paid over the same to plaintiffs without any previous agreement or any direction to apply the same as a credit on the bill of lumber furnished, if any, for Roberts' building, and that plaintiffs, after so receiving the same, applied it as a credit on the indebtedness of said Carrier to plaintiffs, then, in such case, the court instructs the jury that the plaintiffs had the right to apply said payment, and the defendants are not entitled to a credit for said sum, in this action, unless the \$500 was paid to Garth by Carrier, and it was so understood between Garth and Carrier.

4. The jury will, if they find for plaintiffs, say in their verdict what sum, and will also determine as to whether the same is a lien on the building described in the lien.

5. The court instructs the jury that plaintiffs are entitled to six per cent. interest on whatever sum the jury may find to be due the plaintiffs from the date of filing the lien to the present time.

Defendants asked, and the court gave, the following instructions:



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4. If the jury believe from the evidence that defendant Roberts paid Carrier the check of \$500 on the contract for the Roberts building, and that Carrier paid said check to Garth, in obedience to a promise made in the presence of Garth to Roberts, and that Garth knew when he received said check of \$500 from Carrier that the same had been paid to Carrier by Roberts, on said contract, to be paid to Garth, then the amount of said check should have been credited on said account of Carrier on Roberts' building in addition to the other credits testified to by Garth.

5. The court instructs the jury that if you believe from the evidence that the plaintiff has intentionally failed to give credit on the account filed in this cause of any sum paid by the contractor on said account, you will find for defendants Hannah and John Roberts, and will find that no lien exists against said building on said account, and will find against defendant Carrier only the amount due from said Carrier to the plaintiffs, on said account, as appears from the evidence to be due on said account.

Defendants asked, and the court refused, the following instructions, and the defendants excepted:

1. If the jury believe from the evidence that at the time of the sale of the lumber to defendant by plaintiffs, a credit of sixty days was given on the sale, and that plaintiffs began this suit before sixty days had expired upon any part of said account, then the finding must be for defendants.

2. The court instructs the jury that it devolves on the plaintiffs to prove affirmatively, by a preponderance of testimony, that the material sued for and included in his statement filed as a lien actually went into the construction of the building described in the petition, and unless he has done so you will find for defendants Hannah and John Roberts.

3. Even if they should find for plaintiffs they cannot include in their finding any item in the bill of lumber furnished less than sixty days before the commencement of

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the suit on the 14th day of February, provided they believe from the evidence that the credit given by Garth & Co. was sixty days, and if the jury should even find for plaintiffs, they cannot include in their finding any item of the account which was furnished less than ninety days before the commencement of the suit on the 14th day of February, 1872, provided they believe from the evidence that the credit given by Garth & Co. was ninety days.

6. The court instructs the jury that if plaintiffs intentionally failed to give correct credits on the account which is filed in this cause as a lien, or that the materials furnished by him to said Carrier, and in said account mentioned, were not used in the construction of said building, then no lien exists against said building, and you will find for defendants Hannah and John Roberts.

7. The court instructs the jury that if you believe from the evidence that plaintiffs and defendant Carrier, connived together for the purpose of defrauding defendant Roberts, by filing against said Roberts' building a lien and account for a larger sum than was actually due said plaintiffs for materials furnished by him and used in the construction of said building, then no lien exists against said building, and you will find for defendants Hannah and John Roberts.

*M. A. Fyke* for appellants.

*John F. Philips, F. E. Savaye* and *R. C. McBeth* for respondents.

NORTON, J.—This cause has, heretofore, been before this court on the appeal of defendants, and the judgment was then reversed, because the instructions given by the court were contradictory, and because the jury were authorized by them to find for plaintiffs without finding that the materials furnished were used in the construction of the building upon which the lien was claimed. It is reported in 60 Mo. 581, to which we refer as containing a statement of the case. Upon a second trial plaintiffs again

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obtained judgment, from which defendants have appealed and seek a reversal thereof, because of the action of the court in admitting evidence and in giving and refusing instructions.

On the trial plaintiffs introduced J. A. Carlisle as a witness, who, on his re-examination was asked: "How did the bill of lumber that you figured on for the Yeater building compare with the bill for the Roberts' building?" This was objected to as incompetent, and because it did not appear that his figures were correct. The objection was overruled, and witness answered, "That the bill for the Yeater house amounted to about \$1,000, and that it was not as expensive a house as the Roberts' house." The witness, according to his testimony, was a carpenter, engaged in buying lumber and erecting houses, and had been a lumber dealer, and was, therefore, competent to speak in relation to the subject he was testifying about, and we can see no reason why he should not have been allowed to state as a matter of fact, that he had estimated the cost of lumber which entered into another building, and the further fact that the building of defendants was more costly than the one he compared it with, and would require more lumber in its construction. The correctness of his estimate could have been tested by defendants if they had desired to do so by a re-cross-examination. Besides this, in view of the fact that Carrier, the contractor, who bought the lumber and used it in the Roberts' building, as well as Garth, who sold it, both testified that the bill was correct, and the further fact that defendant Roberts had stated to Carlisle that he did not find fault with the bill, we cannot see how the evidence could have misled the jury, even if in strictness it was not receivable.

The instructions given by the court put the case fairly before the jury on the theory announced in 60 Mo. 581, and we perceive no error in the refusal of instructions asked by defendants numbered one, two, three, six and

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seven. The court was requested to tell the jury, in the first instruction, that if they believed a credit of sixty days was given on the sale of the lumber, and that suit was brought in less than sixty days after the sale, they would find for defendants; it was also requested in the third to direct the jury that if they found for plaintiffs, they could not include in their finding any item furnished less than sixty days before the commencement of the suit, provided they believed that the credit given to Carrier was sixty days, nor any item furnished less than ninety days before suit was brought, provided they believed the credit was ninety days. Notwithstanding the fact that defendant Carrier, who was the contractor and bought the lumber sued for and used in the erection of the Roberts' house, made default, thereby confessing the action and entitling plaintiffs to a judgment against him by *nil dicit*, still if defendants had set up in their answer that the lumber sued for was sold on a credit of sixty or ninety days, and that the time of such credit had not expired when the suit was commenced, the declarations asked should have been given. This, however, was not done.

The only averments in the answer touching this question are that the sum sued for was not due at the time the  
2. AMENDMENTS. answer was filed, and that it was not due on the 6th day of January, 1872. There is no averment in the answer that the account was not due on the 14th day of January, 1872, when the suit was commenced. This was virtually confessed by defendants, when, at the close of the evidence they asked permission of the court to amend their answer by making an averment that the demand was not due when the action was commenced. This the court refused to allow, and in view of the fact that the suit was commenced in 1872, had once before been tried, and the judgment on appeal to this court had been reversed for the reason hereinbefore stated, and the further fact that the only defendant against whom judgment *in personam* could be rendered had confessed the action, the per-

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mission to amend was rightfully refused. *Allen v. Ranson*, 44 Mo. 266; *Henslee v. Canneyar*, 49 Mo. 295. The amendment not having been allowed, instructions one and three were properly refused, on the ground that instructions should not be given unless they apply to the case made by the pleadings.

There was no error in refusing the second instruction, because the jury had been correctly informed in regard to the same matter in the first instruction given for plaintiffs. The sixth instruction being a repetition of what is contained in the second given for plaintiffs, and the fifth given for defendants, was for that reason properly refused. There was no evidence on which to base the seventh instruction, and its rejection was, therefore, proper. The evidence of Ladue, which is claimed in connection of that of Roberts, to be sufficient to authorize giving the declaration asked, tends only to show that payments were made other than those credited on the account. Ladue's evidence tends to prove an admission by Garth, one of the plaintiffs, that Carrier had paid \$600 on the account. Defendants had the full benefit of this evidence before the jury under the fifth instruction given for them, as well as the benefit of Roberts' evidence tending to show a payment of \$500.

Judgment affirmed, with the concurrence of the other judges.

AFFIRMED.

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LONG, Appellant, v. THE JOPLIN MINING & SMELTING COMPANY.

1. **Deed**, OF AN ADMINISTRATOR DE BONIS NON. The deed of an administrator *de bonis non*, appointed for the sole purpose of making a deed which his predecessor neglected to make, is a mere nullity, (following *Grayson v. Weddle*, 63 Mo. 523).
2. ———: EQUITABLE TITLE OF PURCHASER WITHOUT DEED. A purchaser

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at an administration sale, duly approved by the probate court, who has paid the purchase money, acquires an equitable interest in the land, which will constitute a sufficient equitable defense to an action of ejectment brought by the grantee of the heirs of the deceased, with actual or constructive notice of the facts.

3. —, EXISTENCE OF, WHEN PROVEN—DELIVERY OF, WHEN PRESUMED.

An order of approval of the report of a sale of real estate, of date November 29th, 1854, showed that, at the time of filing his report, the administrator also filed "a sale bill of said real estate;" the record showed that the purchase money was paid, and it was proven that the administrator and the purchaser had died in 1861; that since their deaths the property had been sold under two deeds of trust executed by the purchaser, of date, respectively, in 1855 and 1858; that those whose titles were divested by the administration sale, made no claim to the property for years after it had been sold under one of said deeds of trust, and not until it had become exceedingly valuable, and the busy seat of population and of mining industry; *Held*, that, as no sale bill of real estate is ever executed by an administrator, the words "sale bill of said real estate" would be construed to refer to, and establish the existence of, a deed for such real estate; and that its delivery and acceptance would be presumed on the following grounds: First, Its delivery would have been the usual concomitant, in the ordinary course of business, of the payment of the purchase money; Second, It would have been the obvious duty of the administrator to have delivered the deed upon the receipt of the purchase money; and, Third, As the deed was a plain conveyance without conditions, its acceptance would have been beneficial; especially as the other facts and circumstances were consistent with the existence of the deed, and tended to strengthen the presumption of its delivery and acceptance.

4. **Administration Sale**, TITLE UNDER; EFFECT OF FINAL SETTLEMENT.

The title to real estate, once vested in a purchaser at an administration sale, will not be divested by a statement of the administrator, in his final settlement, of his acceptance of one-half of the purchase money, only, on the ground that the purchaser was already the owner of one-half of said real estate. The amount of the purchase money was a question in which only those who were interested in the proceeds of the sale were concerned, and as to that they would be concluded by the final settlement if no appeal was taken therefrom.

*Appeal from Jasper Circuit Court.*—HON. JOSEPH CRAVENS,  
Judge.

The deed from M. M. James, referred to in the opin-



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ion, was dated February 28th, 1874, and was executed in pursuance of an order of court upon him, as acting administrator of Alexander Orchard, to make a deed to the defendant, as assignee of William T. Orchard, under his purchase at the administration sale made by Clisby Robinson, the former administrator, who died in 1861. His successor, M. M. James, was appointed October 3rd, 1873. The final settlement of Clisby Robinson of August 25th, 1858, besides giving a description of the land in dispute, and the name of the purchaser, further stated that the sale of the land was made for \$40, through mistake; that the administrator should have been charged with \$20 only, as one-half of the so-called forty acres of land belonged to William T. Orchard, who became the purchaser, and had paid \$20 only for the one-half. The other facts sufficiently appear in the opinion of the court.

*Carter & Clardy with E. T. Farish for appellant.*

The proceedings in the probate court were irregular and defective, and the attempted sale by the administrator conveyed no title. These proceedings were defective in the following particulars:

(a) The only evidence that a report of sale was ever made by the administrator, is the record of the county court approving such report, and in this record the real estate attempted to be sold is not described.

(b) The statute requires a deed to be made to the purchaser, and declares that such deed shall convey to him all the right, title and interest which the deceased had to such real estate, at the time of his death. *Wohlien v. Speck*, 18 Mo. 561; *Speck v. Riffin*, 40 Mo. 405. No deed having been made, and no effort to make one having been shown, the heirs of Alexander Orchard were not divested of their title. *Rorer on Judicial Sales*, (1 Ed.) chap. 4, § 134, p. 59.

(c) The subsequent appointment of M. M. James as

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administrator, was illegal and void, final settlement of the estate having been made some fifteen years before he was appointed, and there being no assets to be administered or debts to be paid. No authority is conferred on the probate court to appoint an administrator *de bonis non* for the sole purpose of making a deed. *Grayson v. Weddle*, 63 Mo. 523; *Gasque v. Moody* 12 Sme. & Mar. 153; *Manly v. Kidd*, 33 Miss. 141. The deeds to Orchard and to the defendant were, therefore, void.

In the final settlement of Clisby Robinson, as administrator, he recites that he sold but one-half of said land to Wm. T. Orchard, said Orchard being the owner of the other half. Now, if the statement is effectual for any purpose, it is to show that defendant has no title whatever to one-half of the land sued for. The defendant having offered this final settlement or amended report of sale in evidence, is estopped from denying its recitals. *Speck v. Riffin*, 40 Mo. 405.

The decree of the court divesting plaintiff of title was irregular, illegal and unwarranted. A court of equity never aids the imperfect execution a statutory power. *Moreau v. Detchmندی*, 18 Mo. 522; *Speck v. Wohltien*, 22 Mo. 310; *Hubbell v. Vaughan*, 42 Mo. 138; *Moreau v. Branham*, 27 Mo. 351; *Bright v. Boyd*, 1 Story 478; 1 Story's Eq., (10 Ed.) chap. 4, § 96, p. 95, and chap. 5, § 177, p. 176; Bispham Prin. of Eq., cap. 1, part 2, § 182, p. 188, and § 193, p. 195; Kerr on Fraud and Mistake, 444. The doctrine laid down in the case of *Houp v. County of Bates*, 61 Mo. 391, does not militate against this position.

G. H. Walser, L. P. Cunningham and Nathan Bray for respondent.

1. We think that the defendant has the legal title to the land; it is conceded that Alexander Orchard died owning the land. It is shown in evidence that on the 29th day of August, 1854, the land was sold at public sale for

the payment of the debts of said Orchard's estate; that the sale was duly reported and confirmed on the 28th day of November, 1854, and the purchaser, William T. Orchard, paid the purchase money; that he (William T. Orchard) gave the two deeds of trust introduced in evidence, made in 1855 and 1858, both of which were regularly foreclosed, and that Logan O. Swope bought under the deed of trust given in 1855, and Nathan Bray under the other, and that both said Swope and Bray conveyed to the defendant; and that defendant thus being vested with the right of William T. Orchard acquired by him under the administrator's sale, obtained an administrator's deed to be made to itself as the assignee of said William T. Orchard.

2. The probate court had jurisdiction to order M. M. James, then acting administrator of the estate of Alexander Orchard, to make to the defendant an administrator's deed, the former administrator, Clisby Robinson, having failed to make any deed. The estate was still open; although Clisby Robinson had presented what seemed to be a final settlement, he was not discharged, and the estate was still within the control of the probate court. *Bartlett v. Glasscock*, 4 Mo. 62; Rorer on Judicial Sales, pp. 144, 145, § 364; *Rugle v. Webster*, 55 Mo. 246; *Shore's Admr. v. Coons*, 24 Mo. 553; 1 Wag. Stat., §§ 36, 37, p. 98.

3. By reason of the administrator's sale to William T. Orchard, the payment of the purchase money, the approval of the sale, and the sale under the two deeds of trust given by William T. Orchard, and the conveyances to the defendant by the purchasers thereunder, defendant became possessed of an equity in and to the land, which coupled with its possession and the improvements made on the land, will surely defeat the plaintiff in this action. The equitable title to the land was vested in William T. Orchard by the administrator's sale and that equity was assignable. *Bartlett v. Glasscock*, 4 Mo. 62; Rorer on Judicial Sales, §

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370; *McLean v. Martin*, 45 Mo. 393; *Jones v. Manly*, 58 Mo. 559; *Shroyer v. Nickell*, 55 Mo. 264.

C. W. Thrasher and H. C. Young for respondent.

The equitable title to the lands in controversy, acquired by respondent from Wm. T. Orchard, independent of the deeds made by M. M. James, as administrator of Alexander Orchard, deceased, was a sufficient equitable title in respondent to defeat a recovery by appellant in ejectment. *Tyler on Ejectment*, 565, 731, 738, 765; *Bartlett v. Glasscock*, 4 Mo. 62; *Castleman v. Relfe*, 50 Mo 583; *Voorhees v. Bank U. S.*, 10 Pet. 478, 479, 449; *Hayden v. Stewart*, 27 Mo. 286; *Tibeau v. Tibeau*, 19 Mo. 78; *Carman v. Johnson*, 20 Mo. 108; *Harris v. Vinyard*, 42 Mo. 568; *Willis v. Wazencraft*, 22 Cal. 607; *Henderson v. Dickey*, 50 Mo. 161; *Petty v. Malier*, 15 B. Mon. 591; *Ells v. Pacific R. R. Co.*, 51 Mo. 200; *Harrington v. Fortner*, 58 Mo. 468; *Collins v. Rogers*, 63 Mo. 515; *Barker v. Circle*, 60 Mo. 258.

SHERWOOD, C. J.—The defendant was successful in the ejectment brought by plaintiff, hence this appeal.

I. An administrator *de bonis non* cannot be appointed for the sole purpose of making a deed which his predecessor had neglected to make; for this reason, the deed made by M. M. James to defendant was a mere nullity. *Grayson v. Weddle*, 63 Mo. 523.

II. But, though the deed of James was inoperative, did not accomplish the purpose which induced his appointment, yet it is by no means clear that plaintiff should have recovered the land sued for.

The records of the county court show that, at the November term, 1854, an order was made as follows: "This day comes Clisby Robinson, public administrator of Jasper county, and *ex officio* administrator of the estate of Alexander Orchard, deceased, and files his report of the sale of real estate belonging to said estate, and also a sale bill of said real estate, which is approved by the court." A subse-

1. DEED, of an administrator *de bonis non*.

2. —: equitable title of purchaser without deed.

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quent entry, made February, 1855, showed permission granted by the county court, to the public administrator, to amend his report, and a further entry, made August 25th, 1858, shows the final settlement of the administrator, which contains a description of the land in controversy—forty acres—and the person to whom it had been sold. William T. Orchard, under whom defendant claims by means of deeds of trust, executed by Wm. T. Orchard, in the year 1855, to Jno. R. Chenault and to Wm. M. Chenault, in August, 1858, and sales under such deeds in 1867 and 1874, at which sales those under whom defendant claims, purchased the property in suit. Alexander Orchard, mentioned in the county court proceedings, died in 1853, and he was the patentee of the land, the patent therefor having issued in 1852. Plaintiff claims under a quitclaim deed from his heirs, executed in 1872. The land in controversy has had no occupant or improvement from 1853 up to 1870, in which former year a small hut erected by Alexander Orchard, assisted, perhaps, by Jeremiah and Wm. T. Orchard, was destroyed or removed. In 1870, however, lead, in large quantities, having been discovered on the tract in question, it has become very valuable, and together with adjacent tracts, has become the seat of a populous town called "Joplin City," an addition to that town covering a portion of the land sued for, having been laid out in 1872, anterior to plaintiff's purchase from the heirs. We entertain no doubt that Wm. T. Orchard, by his purchase at the administration sale, acquired at least an equitable or beneficial interest in the premises sold; and although those premises are not properly designated in the order approving the report of sale, yet the final settlement shows the description of the land and to whom sold; and this is amply sufficient. That William T. Orchard acquired, by his purchase of and payment for the land, an equitable interest therein, is shown by our own adjudicated cases. *Bartlett v. Glasscock*, 4 Mo. 62; *Castleman v. Relfe*, 50 Mo. 583; *Grayson v. Weddle*, 63 Mo. 523. We do not under-

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stand the case of *Wohlien v. Speck*, 18 Mo. 561, as going to the extreme of asserting that no equitable title passed to the purchaser at an administration sale, and after the regular approval thereof. The question in that case was upon the sufficiency of the legal title of plaintiff, to maintain ejectment, where the approval occurred at the same term as the sale, then regarded as a fatal defect; and where no deed had been delivered. The non-approval of the sale at the proper term was held as one of the chief impediments to success in a proceeding in equity, by the same plaintiffs, and the intimation clearly given that if the approval had occurred at the proper term a different result might have followed. However that may be, the doctrine was well settled in this State at that time, that a purchaser at an administration sale did acquire, upon the approval of the sale and the payment of the purchase money, an equitable title to the premises sold, though no deed had been made. *Bartlett v. Glasscock*, *supra*. The authority of that case was not called in question in the *Speck-Wohlien* case, and the doctrine that the purchaser at an administration sale, who, in conformity to the order of approval, has paid the purchase money, has an equity which is a sufficient basis whereon to base equitable interposition, has since found frequent recognition in this court. *Grayson v. Weddle*, *Castleman v. Relfe*, *supra*; *State v. Towel*, 48 Mo. 148. And most assuredly it would be a grave and great reproach on the administration of public justice, if a purchaser at a probate sale regular in every particular, who has done all that was necessary on his part, and having, in consequence of the death of the administrator, who had fully administered, neither ground for nor adequate relief at law, should appeal in vain to a court of equity for that relief, which was denied him in every other quarter. And if it be admitted that an equity is acquired by the purchaser at administration sale, although no deed be made, this admission paves the immediate way for the further admission that a court of chancery will, under appropriate circum-



stances, call into active exercise its numerous and flexible powers, in affording that measure of relief, incapable of being afforded, or furnished, by other jurisdictions. In other words, whenever you establish an equity, you thereby, and *ipso facto*, establish the consequent right to have that equity given recognition and protection. We have no hesitancy, therefore, in holding that defendant was justified in invoking equitable relief in support of the case, made by its answer, and this more especially as plaintiff is confessedly a purchaser, with such notice, at least as was sufficient to put him on inquiry, and which, if pushed with reasonable diligence, would inevitably have led to the discovery of defendant's equitable title.

III. But there is no slight reason for believing that defendant is the holder of the legal, as well as the equitable, title to the premises in controversy.

3. —: existence  
of, when proven  
— delivery of,  
when presumed.

The order approving the report of the sale of the real estate, shows that the public administrator filed, at the same time, "a sale bill of said real estate." As no "sale bill" of real estate is ever executed by an administrator, we are of the opinion that those words can reasonably refer to nothing else but the deed for such real estate, and that the clerk of the county court, through ignorance or inadvertence, used inappropriate words. If it be granted that the inference here drawn, as to the proper meaning of the words referred to, is not an unreasonable one; that a deed, in due form, was executed by the public administrator; the delivery of such deed may well be presumed; and this on several grounds:

1st. It is but in accord with the usual course of business, for the administrator to deliver the deed on receipt of the purchase money; that the purchase money was paid, is shown by the record. The principle is a familiar one, that if you prove the existence of one fact, that another, its usual concomitant in the ordinary course of business, will be presumed. 1 Glf. Ev., § 40, and cases cited. Mr. Justice Story, in this connection, remarks; "By the general

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rules of evidence, presumptions are continually made in cases of private persons, of acts, even of the most solemn nature, when those acts are the natural result, or necessary accompaniment, of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace, and the security of private property, indulges its own presumptions." *Bank v. Dandridge*, 12 Wheat. 64.

2nd. The delivery of the deed may be presumed, because Clisby Robinson, being public administrator, it was his obvious duty, on receiving the purchase money for the land, to have, as a concurrent act, delivered to the purchaser, the necessary conveyance; the presumption at once arises that he did not omit the performance of such a plain official duty.

In *Hartnell v. Root*, 19 Johns. 345, Mr. Justice Woodworth said: "The general rule is that where a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be intended that he has duly performed it, unless the contrary be shown." In that case, an action of trespass, it was presumed that the officer against whom the suit was brought, had made the requisite levy during the life of the execution, and, consequently, that he was no trespasser, though he sold the property after the return day thereof. In *Jackson v. Shaffer*, 11 Johns. 517, it was contended that the sale was void, because no prior levy was shown, but the court said: "It nowhere appears there has not been a levy, and if it were necessary they would, under the circumstances of the case, presume it to have been made." So also in Lord Halifax's case, on information against him, for his refusal to deliver up the rolls of the auditor of the exchequer, the court put the plaintiff upon proving the negative, viz: That his Lordship did not deliver them; "for a person shall be presumed duly to execute his office 'till the contrary appear." Bull N. P., p. 298. And in an

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action against a sheriff for a false return, the burden of proving the negative allegation of falsity devolves on the party asserting it. *Clark v. Lyman*, 10 Pick 47.

3rd. A person is presumed to accept a plain, absolute conveyance without conditions, the acceptance of which is beneficial to him. *Bank v. Bellis*, 10 Cush. 276; 3 Wash. Real Prop. 266; *Foley v. Howard*, 8 Clarke (Iowa) 56, and slight acts evidencing such acceptance will suffice. *Bank v. Dandrige, supra*. Now the acceptance of a deed presupposes its delivery, and the one may, therefore, be presumed as well as the other. And the acceptance of a deed from the public administrator is sufficiently shown in the present instance by the payment of the purchase money, and by the deeds of trust executed in 1855 and 1858 by Wm. T. Orchard, the purchaser; acts which cannot be reasonably accounted for, save upon the supposition of the acquisition of the title.

These and similar presumptions are indulged in, as Mr. Justice Story says in *Bank v. Dandrige, supra* "according to the maxim, *omnia præsumuntur, rite et solemniter esse acta donec probetur in contrarium*." There is a class of cases where juries are instructed, or advised, to presume conveyances between private individuals, in favor of the party proving a right to the beneficial enjoyment of the property whose possession is consistent with such presumption, 1 Glf. Ev., § 46, and cases cited. This case however, is not regarded as falling within that category; for here owing to the nature of the land, there has been no occupation or cultivation; and the conveyance is not between private individuals. But in the case at bar the existence of the conveyance, and the payment of the purchase price, having as we think, been established by the record, we are only called on to presume that the regular and natural order of business was observed, and that a public officer was not guilty of a culpable omission of duty; these are presumptions which in the light of the authorities cited may well be indulged in, especially as some twenty years

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had elapsed between the approval of the sale and the hearing in this cause; especially, too, as the public administrator and the purchaser died in 1861, and since that time the property has been sold under two deeds of trust executed by the purchaser during the life of the administrator, the one deed being executed some three years before the final settlement, and the other the next day thereafter. And what adds additional strength to these presumptions, is that those whose title was divested by the administration sale; whose title plaintiff represents, made no claim to the property until years after it had been sold under one deed of trust, discovered to be exceeding valuable, and had become the busy seat of population and of mining industry.

IV. But it is urged that the final settlement, taken in its broadest extent, only shows that one-half of the land in suit was sold to Wm. T. Orchard. In reference to this, it may be observed that the administration sale, being duly approved, vested as above seen, the equitable and beneficial title in the purchaser, and if the presumptions respecting the deed of the public administrator and its delivery have been correctly indulged in, then all the right, title and interest which the deceased had in the property, both legal and equitable, passed to the purchaser. 1 R. S., p. 147, § 35. If the public administrator, after the sale and its approval, and the delivery of the deed, saw fit, on the representations of the purchaser, to remit one-half of the purchase price, that would not divest the title already vested; that was a question altogether between the public administrator and those who were interested in the proceeds of the sale. But further regarding that point: Under our more recent adjudications, the same liberality of intendment is allowed as to the proceedings of a county court respecting matters within its jurisdiction as to any other court. *Johnson v. Beazly*, 65 Mo. 250, and cases cited. It will be intended, therefore, that due notice of

4. ADMINISTRATION  
SALE, title under:  
effect of final set-  
tlement

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the final settlement was given; this notice when given had the effect to bring before the court, at the term of the final settlement, "creditors and all others interested in the estate." 1 R. S. p. 162, §§ 16 and 17. As that final settlement passed unchallenged at the hands of those thus summoned to attend, as no appeal was taken therefrom, we must intend that the question whether the deceased was the owner of more than one-half of the real estate was then and there upon sufficient testimony incidentally passed upon and determined, determined in a manner not at variance with the balance sheet which the public administrator represented to the court for its approval.

Judgment affirmed. All concur except HOUGH, J., not sitting.

AFFIRMED.

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FELLOWS, *Plaintiff in Error*, v. JERNIGAN.

THE petition in a suit against two persons need not state that the liability was jointly incurred by the defendants.

*Error to Lawrence Circuit Court.*—HON. JOSEPH CRAVENS,  
Judge.

*C. B. McAfee* and *N. Gibbs* for plaintiff in error.

*Henry Brumback* and *John T. Teel* for defendant in error.

HOUGH, J.—This suit was brought by the plaintiff, as the assignee of Fellows & Sperry, against Lawson D. Jernigan and H. C. Bottefuhr. The petition alleged that said defendants were, on, &c., indebted to said Fellows & Sperry for money laid out and expended by them at the request of the defendants, for, &c. A demurrer to this petition was sustained on the ground that it did not allege any joint liability on the part of the defendants. The case of *Gates*

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*et al. v. Watson et al.*, 54 Mo. 585, is decisive of this. An averment similar to the one now being considered, was then held to be sufficient. The judgment will, therefore, be reversed and the cause remanded. All concur.

REVERSED.

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CROW, *Appellant*, v. BEARDSLEY.

1. **Voluntary Assignments.** The statute relating to voluntary assignments, (Wag. Stat., 150,) which provides that "every voluntary assignment, &c., made by a debtor to any person in trust for his creditors, shall be for the benefit of the creditors of the assignor in proportion to their respective claims," does not avoid an assignment which gives a preference to certain creditors. The assignment will stand, but it will inure to the benefit of all the creditors, as well those not named as those named.
2. **"Assignment:" DEED OF TRUST.** The word "assignment," as used in the above section, does not include a deed of trust.
3. **Construction of Statute: "OR:" "AND."** The statute declaring that conveyances made with intent to hinder, delay or defraud creditors, shall be void. An instruction that the jury should find for the defendant, unless the conveyance was made to hinder, delay and defraud creditors, is erroneous.

The words "Hinder," "Delay" and "Defraud" are not synonymous.
4. **Trust Deed: FRAUD.** As against creditors, the participation of either the trustee or the beneficiaries of a deed of trust in the fraud of the grantor, is sufficient to avoid the deed.

*Appeal from Audrain Circuit Court.*—HON. G. PORTER,  
Judge.

Petition filed May 5th, 1875, for goods sold and delivered by plaintiff to defendant, George Beardsley. On the same day an attachment was issued and levied upon a stock of general merchandise, the property of defendant, Beardsley. W. H. Kennan interpleaded, setting up a deed of trust executed by Beardsley to him in consideration of \$1.00



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paid, and the debt and trust thereafter mentioned and in trust for the following purposes. \* \* The deed then sets out the debts of the beneficiaries, none of them being due, and provides that if the debts be paid at their maturity, the deed should be void, otherwise to remain in full force; and in case of default, provided for a public sale of the property by the trustee, after notice, and an application of the proceeds to the payment of the debts specified. The only peculiarity about the deed was that it put the goods in the possession of a third party until default in the payment of the debts. The deed was acknowledged and recorded on the day of its execution and before the attachment. The plaintiff's claim was not mentioned in the deed. On the trial, on motion of respondent, the court instructed the jury as follows: 1. The court instructs the jury that the deed made by Beardsley to Kennan, read in evidence, was a deed of trust to secure the payment of the debts therein mentioned, and is valid and good against plaintiff herein, unless the jury should believe from the evidence that said deed was made with the fraudulent intent, on the part of Beardsley, to hinder, delay and defraud his creditors, and that the creditors secured by said deed either had knowledge of or participated in such fraud. 2. The court instructs the jury that although they may find from the evidence that Beardsley owed other debts than those mentioned in the deed to Kennan, still the jury must find for plaintiff, unless they further find that the deed to Kennan was made by Beardsley for the purpose and with the intent to defraud such other creditors, and that the parties secured by the deed to Kennan knew of such fraudulent intent. Verdict and judgment for interpleader. Plaintiff appeals.

*H. Clay Ewing* with *Thomas H. Musick* and *John M. Gordon* for appellant, cited *Burgert v. Borchart*, 59 Mo. 80; *Read v. Pelletier*, 28 Mo. 173; *Bigelow v. Stringer*, 40 Mo. 195; *Potter v. McDowell*, 31 Mo. 62; *Manny v. Logan*, 27

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Mo. 528; *State v. Benoist*, 37 Mo. 500; *Ensworth v. King*, 50 Mo. 477; *Henderson v. Henderson*, 55 Mo. 534.

*Macfarlane & Trimble* with *W. H. Kennan* for respondent.

HENRY, J.—Both appellant's and respondent's counsel seem to labor under the impression that the first section of the act in relation to voluntary assignments.

1. VOLUNTARY ASSIGNMENTS.

W. S. 150, avoids all assignments which give a preference among creditors. We are not inclined to place that construction upon the section. It provides that, "every voluntary assignment, etc., made by a debtor to any person, in trust for his creditors, shall be for the benefit of all the creditors of the assignor, in proportion to their respective claims." In other words, whether one or more of the creditors be named it shall nevertheless inure to the benefit of all. By the 39th section of the act of 1855, "every provision in any assignment, hereafter made in this State, providing for the payment of one debt or liability in preference to another, shall be void; and all debts and liabilities, within the provisions of the assignment, shall be paid *pro rata* from the assets thereof." This provision is no longer in force. That section permitted the debtor to prefer creditors by an assignment, but forbade a preference of one or more over others named therein. It did not avoid an assignment giving such preference, but only that provision making the preference. *Shapleigh v. Baird*, 26 Mo. 326. Section one of the act now in force has a wider scope, and was designed to prevent any preference of creditors whatever by assignment. Nothing in the section indicates that an assignment preferring a portion of the creditors should be void; but the most reasonable construction of the section is, that the assignment should stand and inure to the benefit of all, as well those not named as those named in the assignment. If the counsel are correct in their view, that the deed executed

by Beardsley is an assignment, they had no occasion to resort to an attachment, because they would have had equal rights under the deed with those named therein, and could by proper proceedings have compelled the trustee to discharge his duties under the assignment law.

But is the deed executed by Beardsley an assignment? "An assignment is more than a security for the payment of debts; it is an absolute appropriation of property to their payment." Burrell on Assignments, vol. 1, p. 12. The same author distinguishes between assignments and deeds of trust in the nature of mortgages. He says, page 15: "In most of the States assignments in trust are frequently employed for a double purpose—ultimately as modes of provisions for the payment of debts, but intermediately as instruments of security against default of payment by the debtor. Hence they are in many cases drawn with a condition that if the grantor pay the debt provided for within a specified time, the trustee shall reconvey to him the property, or that the deed shall thereupon be void, or *e converso* that if the debtor do not pay the debt by a day named, the trustee shall sell the property and apply the proceeds in payment." The distinction is, that an assignment, "is a conveyance to a trustee for the purpose of raising funds to pay a debt, while a deed of trust in the nature of a mortgage, is a conveyance in trust for the purpose of securing a debt subject to a condition of defeasance." 19 Ohio, 216; *State to use v. Benoist*, 37 Mo. 500. The deed in question here is, therefore, a deed of trust in the nature of a mortgage. That the word "assignment," in section one of the act relating to assignments, does not comprehend deeds of trust, as they are familiarly known, is more apparent if we consider in this connection the act in relation to trusts and trustees, Wag. Stat. 1347. It is a clear recognition of a distinction betwixt assignments and deeds of trust. Treating the instrument as a deed of trust, did

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the court err in giving for respondents the first and second instruction?

The first instruction is erroneous in declaring that the jury should find for interpleader, unless they should believe from the evidence that the deed was made 3. CONSTRUCTION OF STATUTES: "or"; "and," to hinder, delay and defraud the creditors of Beardsley. The statute declares that conveyances made with the intent to hinder, delay or defraud creditors shall be taken to be clearly and utterly void. The words "hinder," "delay" and "defraud" are not synonymous. A conveyance may be made with intent to hinder or delay without an intent to defraud. Either intent is sufficient. The instruction, however, declares the conveyance good, unless it was made with the intent to hinder, delay and defraud. In *Burgert v. Borchert*, 59 Mo. 80, SHERWOOD, J., commenting upon a similar instruction in an analagous case, said: "Thus instructed, the jury, rationally enough, might find that an intent existed to obstruct creditors in the collection of their debts, and also to defer the payments which were due them, without finding that the debtor cherished the knavish design to prevent the ultimate collection of the debt."

It is contended that the instruction is also erroneous in requiring the jury, before they could render a verdict for appellants, to find not only a fraudulent 4. TRUST DEED: fraud. intent on the part of Beardsley, but that the beneficiaries had knowledge of such intention. If Beardsley, by the conveyance, intended to defraud his creditors, and either the trustee or the beneficiaries were privy to such intended fraud, it would invalidate the conveyance.—*Gates v. Labaume*, 19 Mo. 25; *State v. Benoist*, 37 Mo. 500; *Byrne v. Becker*, 42 Mo. 269. *Pinneo v. Hart*, 30 Mo. 561, has been cited as in conflict with this doctrine, but in the case of *State v. Benoist*, the court observed that "the case of *Pinneo v. Hart* is distinguishable from a case of this kind." There the debtor assigned his whole property for the benefit of all his creditors, and it was held that not-

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withstanding some fictitious debts with the knowledge of the assignee were included, the trust could be carried into effect under the assignment act. See, also, *Bump on Fraudulent Conveyances*, 363. Although Beardsley may have made the conveyance with the intent to hinder, delay or defraud his creditors, yet if neither the trustee, nor the beneficiaries were aware of his purpose, but acted in good faith, his evil intent does not avoid the conveyance. *Byrne v. Becker, supra*. The first and second instructions for interpleaders were erroneous, therefore, in that they required the jury to find that the beneficiaries participated in the frauds of the grantor, before they could find the deed void, although the evidence may have tended to prove the trustee a party to the fraud. The participation of either the trustee or the beneficiaries in the fraud of the grantor is sufficient to avoid the deed. Respondent insists that although the first instruction is erroneous, the judgment should not be reversed on that account, because they contend there was no evidence of fraud against the trustee or beneficiaries. There was evidence—we will not say how much—tending to prove fraud on the part of the grantor and the trustee. If there be any evidence tending to prove a given fact, whatever the court may think of its sufficiency, that issue cannot be withdrawn from the jury under the assumption that the evidence is not sufficient to establish the fact. So, here we cannot say that there was no evidence tending to prove fraud. The judgment is reversed and the cause remanded. All concur.

REVERSED.

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Altringer v. Capeheart.

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ALTRINGER, *Plaintiff in Error*, v. CAPEHEART.

1. **The Word "Release,"** following the words "grant, bargain and sell," in a deed, *Held*, not to restrict the meaning of these words so as to destroy the covenants which by statute they import.
2. **Deeds.** The consideration clause in a deed is always open to explanation.

*Error to Henry Circuit Court.*—HON. F. P. WRIGHT, Judge.

*B. G. Boone* for plaintiff in error.

*Ladue & Fyke* for defendant in error.

NORTON, J.—This is an action of ejectment to recover possession of eighty acres of land in Henry county. The petition is in the usual form, and the answer is a general and specific denial. On the trial judgment was rendered for defendants, from which plaintiff prosecutes his writ of error. It was admitted on the trial that Joseph Capeheart entered the land in controversy from the United States. Plaintiff, to maintain his cause of action, offered in evidence a deed of warranty from Joseph Capeheart and wife, to one Joshua F. Furgerson, to the land in controversy, dated November 10th, 1860; also a mortgage on said land from Furgerson to George Gutridge, dated —, 1863; also a sheriff's deed from Henry T. Dodson, as sheriff of Henry county, to George Gutridge, for said lands, which was sold under decree and judgment of foreclosure of said mortgage from Joshua F. Furgerson to George Gutridge, said sheriff's deed was dated October 15th, 1870; also warranty deed from George Gutridge and wife to plaintiff in error, dated January 20th, 1874; also second deed of warranty from George Gutridge and wife to plaintiff in error, for said land, dated January 20th, 1874. The defendant, in support of his title, introduced and read in evidence, against objection of plaintiff's counsel, a certain deed from George Gutridge and wife to Joseph Capeheart, to the land in question, dated November 17th, 1866; also a



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deed from Joseph Capeheart and wife to Aaron Capeheart and James Capeheart, dated in 1869; also a deed from Aaron Capeheart and James Capeheart to defendant, John Capeheart, dated in 1871. It was further admitted by both parties, on the trial of the cause, that at the time of the execution of the deed of November 17th, 1866, from George Gutridge and wife to Joseph Capeheart, (read in evidence by defendant,) the mortgage from Furgerson to Gutridge was outstanding and unpaid, and belonged to said George Gutridge; and it was further admitted, by both parties, that said mortgage was, afterwards, foreclosed, and that Gutridge purchased the land in controversy at the foreclosure sale.

The controlling question in the case arises upon the construction of the following deed: "Know all men by these presents, that we, George Gutridge and Elizabeth, his wife, of the county of Henry and State of Missouri, have this day, for and in consideration of \$1.00, to them in hand paid by Joseph Capeheart, the receipt whereof is hereby acknowledged, do grant, bargain and sell, and by these presents do grant, bargain, sell and release unto the said Joseph Capeheart, his heirs and assigns forever, the following described real estate, being the same several tracts or parcels of lands conveyed by S. K. Williams, sheriff of Henry county, to said George Gutridge by deed, bearing date October 13th, 1866, and therein fully described and set forth." Then follows a description of the lands embracing 320 acres, and including the lands in controversy. "To have and to hold the above described real estate free from the claim or claims of all persons whatever. In witness whereof, we have affixed our hands and seals this November 17th, in the year of our Lord one thousand eight hundred and sixty-six. (1866.)

GEORGE GUTRIDGE, [SEAL.]

ELIZABETH GUTRIDGE, [SEAL.]"

The trial court declared that the words "grant, bar-

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gain and sell," in the deed, expressed, on the part of Gutridge, that he was, at the time of its execution, seized of an indefeasible estate in fee simple in the lands conveyed, and that said lands were free from incumbrances, done or suffered by Gutridge, or any person under him; and also, for further assurance of such real estate to be made by Gutridge to Capeheart, and that whatever title was acquired by Gutridge at the sale made under the decree foreclosing the mortgage from Furgerson to Gutridge, dated in 1863, passed to Capeheart by virtue of the deed executed by said Gutridge in November, 1866. Under 1 Wag. Stat., sec. 8, p. 274, the words grant, bargain and sell in all conveyances in which any estate of inheritance in fee simple is limited, shall, unless restrained by express terms contained in such conveyance be construed to express all the covenants above mentioned. It is, however, urged by counsel, that the word release contained in the deed, has the effect of restricting the words grant, bargain and sell, so as to destroy the statutory covenants which these words import, and convert it into a deed of mere quit-claim. We think the objection is not well taken. The words grant, bargain and sell first occur in the deed wholly unrestricted, and the deed conveys, in express terms, the land itself to Capeheart and his heirs forever, free from the claims of all persons whatever, and not simply the right, title and interest of Gutridge. We have been cited to the cases of *Gibson v. Chouteau* 39 Mo. 566; *Chauvin v. Wagner*, 18 Mo. 531; *Bogy v. Shoab*, 13 Mo. 380. In no one of these cases do the words grant, bargain and sell occur in the deed, and the deeds considered by the court conveyed only the right, title and interest of the grantors, and they were, therefore, put on the footing of quit-claim deeds under which no after-acquired title would pass.

It is also objected that the court erred in admitting the evidence of Capeheart, showing that the deed of 1866,

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from Gutridge to him, was made in consideration of a conveyance by Capeheart to Gutridge of another

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eighty acre tract of land. We perceive no error in this, as the consideration clause in a deed is always open to explanation or contradiction. *Fontaine v. Boatmen's Saving Institution*, 57 Mo. 553; *Miller v. McCoy*, 50 Mo. 214.

Judgment affirmed, in which the other judges concur.

AFFIRMED.

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THE STATE V. WOOD, *Appellant*.

1. **Continuance:** CRIMINAL LAW. A person committed to jail upon a criminal charge, is under no obligation to prepare for trial until an indictment has been found. If, as soon as he is indicted, he sets about diligently to make his preparations, but does not succeed in securing the attendance of witnesses whose testimony is material to his defense, he is entitled to a continuance.

*Appeal from Jasper Circuit Court.*—HON. JOSEPH CRAVENS, Judge.

Defendant was arrested and committed to jail upon a charge of horse stealing on the 8th day of August, 1877. The other facts appear in the opinion of the court.

*H. B. Hamilton* for appellant.

*J. L. Smith*, Attorney-General, for the State.

HENRY, J.—On the 18th day of September, 1877, the defendant was indicted in the Jasper circuit court, charged with having stolen two horses, the property of Peter Sealey, on the 5th day of August, 1877. On the 27th day of September, 1877, the cause was called for trial and the defendant filed the following affidavit for a continuance: And the said Allen Wood, after being duly sworn, upon his oath says he cannot safely proceed to trial at the present term of this court for want of material evidence.

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And the said Wood would show to the court that on the 18th day of September, 1877, he was indicted in this honorable court, charged with stealing two horses, the property of Peter Sealey. Affiant says as soon as he was informed of the charge against him, he wrote and caused to be written, two letters, to John Flannagan, at Corry and St. Joseph, and — Bodenhammer, at Marshfield and Lebanon; that he received no reply to said letters until the 25th day of September, 1877, when he learned that the deposition of said John Flannagan could be taken at St. Joe, Missouri, where the said Flannagan resided; that affiant did not learn of the said Flannagan's whereabouts until the receipt of the letter aforesaid, from the fact that at the time affiant met said Flannagan hereinafter mentioned, said Flannagan represented to affiant that he, said Flannagan, was going to the Dade county mines and expected to remain there during the winter, and affiant says that there was with, and in company of said Flannagan at this time, the aforesaid Bodenhammer; that he wrote, and caused to be written, divers letters to said Bodenhammer at Marshfield, Lebanon and other places, which he thought would be most likely to reach him; that on the — day of September, 1877, he received a letter from said Bodenhammer, stating that he would attend this term of this court to testify in defendant's behalf; that said Bodenhammer has not more than had time to get here, had he started from Lebanon, the place where he was staying, on receipt of affiant's letter informing him of the day fixed for trial. Affiant says he cannot procure the testimony or attendance of said Flannagan in time to be used at the present term of this court, but that he can procure the same to be used at the next term of this court, from the fact that the said Flannagan, instead of stopping in Dade county, has returned to St. Joe, and will, as affiant is informed, remain there all winter; that unless the said Bodenhammer should arrive in time to testify at this term of court, affiant can procure his deposition to be used in evi-

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dence at the next term of this court. Affiant says he expects to prove and will be able to prove, by both of said witnesses, that on the morning of the 6th day of August, 1877, two men who said they were from Texas, came to the camp where said Flannagan, Bodenhammer and affiant had been stopping over night and took breakfast with defendant and others; that said Bodenhammer was acquainted with the Texas parties and said he was all right; that said White said he wanted to take the train to Springfield and would sell said horses very cheap; that after considerable conversation, affiant purchased said horses with the saddles and bridles thereon, and paid White in cash therefor; that a bill of sale was drawn up and witnessed by said Bodenhammer, who assured affiant that he could rely upon the representations of said White. Affiant says he knows of no other witnesses or witness by whom he can prove any of the facts aforesaid, except by said Flannagan and Bodenhammer, and ———, whose real name affiant has forgotten and of whom he has been unable to learn anything since the trade aforesaid. Affiant says he verily believes that if the cause is continued until the next term of this court, he can procure the testimony aforesaid; that this application is not made for vexation or delay, but that justice may be done; that he could not, under any process whatever, have procured said testimony earlier unless the parties of their voluntary accord should in person attend this court.

ALLEN WOOD.

Subscribed and sworn to before me this 27th day of September, 1877.

M. TAYLOR, Clerk.

By B. F. HACKNEY, D. C.

His application for a continuance was refused and the defendant was compelled to proceed to trial, which resulted in his conviction and sentence to the penitentiary for a term of six years. The only question presented for consideration is the sufficiency of the affidavit for a continu-

ance. By the first section of article 5 of the act regulating practice in criminal cases, Wag. Stat. 1094, "all indictments shall be tried at the first term at which defendant appears, unless the same be continued for cause."

Is a defendant required to use any diligence to prepare for trial before indicted? Until indicted there is no cause pending against him in the circuit court, and he could not have subpoenas for witnesses in a cause not pending. If one is charged with an offense before a justice of the peace, the proceedings before him are to ascertain whether an offense has been committed, and there is probable cause to believe the prisoner guilty thereof, and all examinations and recognizances taken by him he is required to certify and deliver to the clerk of the court in which the offense is cognizable on or before the first day of the next term. If the accused be committed to jail by the justice and the justice file the examinations, as he may, on the first day of the term of the circuit court, and on that day as may be, the grand jury return an indictment against the prisoner, the cause is triable at that term, and yet there could not have been a cause pending in the circuit court before the indictment found and the papers were returned. Nothing on the court docket or in the clerk's office would have warranted the clerk in issuing subpoenas for witnesses for the accused, and it makes no difference if the justice file the papers before the commencement of the term. They are only deposited with the clerk to be used before the grand jury, and depositing them with the clerk has no more significance than if the law had required them to be deposited elsewhere for that purpose. There is nothing in the act to countenance the idea that a cause is pending in the circuit court against one accused of crime until an indictment shall have been preferred against him. The law presumes every one innocent until the contrary appears, and one accused of crime, until the grand jury shall have passed upon his case, has a right to rest upon the same presumption and believe that he will not be indicted. The



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defendant, here, had a right to presume that he would not be indicted, and was under no obligations until indicted to make any effort to prepare for trial.

After he was indicted did he use proper diligence to get ready for trial? From the affidavit it appears that defendant had met Flannagan in company with Bodenhammer, and learned from Flannagan that he was going to the Dade county mines to remain during the winter. It is clear from the correspondence between accused and Flannagan, although not expressly stated, that the accused had information that led him to doubt as to the whereabouts of Flannagan. He wrote to him at Corry, in Dade county, and at St. Joseph, Buchanan county, and the result of that correspondence shows that his doubts were justified, for he received information that he was at St. Joe. If he had merely wanted delay he could have acted on the information first received and sent a subpoena for Flannagan to Dade county, but the facts disclosed in the affidavit rather show that defendant was in good faith endeavoring to get ready for trial. He did not know where Bodenhammer was, but wrote to Marshfield, Lebanon and other places where he thought he might be found, and learned that he was at Lebanon. A subpoena to that county would, perhaps, have been served on Bodenhammer, but if defendant was not informed where Bodenhammer was to be found and was honestly endeavoring to ascertain the fact, it is not to be regarded as a circumstance fatal to his application, that he was found in one of the counties to which he directed a letter to him. But if the affidavit be held insufficient as to Bodenhammer, it is in our judgment sufficient as to witness Flannagan, and although inclined to sustain the circuit court in refusing applications for continuance, this case presents an abuse of discretion in that matter which demands our interposition. The circuit court probably erred in consequence of believing contrary to our views, that defendant should have made preparation for trial after he was committed to jail and before he

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was indicted. The judgment is reversed, NAPTON and HOUGH, JJ., concurring; SHERWOOD, C. J., and NORTON, J., dissenting.

REVERSED.

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HISAW V. SIGLER, *et al.*, Appellants.

**Witness:** PARTY TO A CONTRACT INCOMPETENT WHEN OTHER PARTY DEAD.

In a suit against the makers of a promissory note prosecuted by the administrator of the deceased payee, a defendant is not a competent witness on behalf of one of his co-defendants to prove failure of consideration.

*Appeal from Lawrence Circuit Court.*—HON. JOSEPH CRAVENS,  
Judge.

Action by Frederick Hisaw against P. B. Sigler and A. Cann, as makers of a promissory note. Pending the suit Frederick Hisaw died, and the cause was revived and continued in the name of William Hisaw, his administrator.

*N. Gibbs* for appellants.

*John T. Teel* for respondent.

NAPTON, J.—This suit was originally brought before a justice of the peace, by Frederick Hisaw, on a note for \$75, signed by the defendants and one Hatfield. The judgment before the justice of the peace was for the plaintiff. Frederick Hisaw was the payee in the note. The case was taken to the circuit court by the defendants, and the defense there was that the note was delivered as an escrow, that it was given at the instance of one Hatfield, and by him transferred to plaintiff, and that the consideration upon which said note was given totally failed; that

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the note was transferred by Hatfield to pay a previous debt of his to Hisaw, and that Hisaw refused to take it unless said Hatfield would sign it, and that Hatfield did sign it without the knowledge of defendants. On the trial P. B. Sigler was offered as a witness for the defendants, to establish the want or failure of consideration for the note, so far as Hatfield was concerned. The plaintiff objected, for the reason that Frederick Hisaw, to whom the note was given, was dead, and this objection was sustained by the court, and the defendants excepted. This presents the only point we are authorized to consider, as no exception was taken to the action of the court in refusing instructions, and their propriety is not, therefore, before us. In regard to the exclusion of Sigler, the case is identical in principle with the case of *Angell v. Hester*, 64 Mo. 142, where the construction of our statute, in connection with the decisions of this and other courts on similar statutes, is fully examined. It is unnecessary to repeat what is there said; it is sufficient to say that on the authority of that case the judgment must be affirmed. All the judges concur.

AFFIRMED.

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CHANDLER V. STEVENSON, *Plaintiff in Error*.

1. **Administrator:** TITLE TO PROPERTY. The doctrine of the common law that an administrator takes the property of the intestate in absolute ownership does not prevail in this State; and the power of the personal representative of the deceased to dispose of the assets is limited and regulated by statute.
2. **Administration:** "CREDITOR OF THE ESTATE." Wagner's Statute, section 40, page 89, authorizing the executor or administrator of any estate to assign any note or bond of the estate to any creditor, legatee or distributee, in discharge of an amount of his claim equal to the amount of such note or bond, does not permit an administrator to assign a note belonging to the estate under his charge, to a person

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who is jointly liable with the estate upon a note to a third person. The joint obligor is not a creditor of the estate, though he may become such by paying off the note.

*Error to Bates Circuit Court.*—HON. F. P. WRIGHT, Judge.

*Boggess & Cravens* for plaintiff in error.

• *D. K. Hall* for defendant in error.

NORTON, J.—At the February term, 1873, of the common pleas court of Cass county, William Chandler, the defendant in error, exhibited for allowance against the estate of Jehiel C. Stevenson, of which Amanda L. Stevenson, the plaintiff in error, was administratrix, a note as follows:

HARRISONVILLE, Mo., November 11th, 1871.

“Eight months after date, I promise to pay to the order of Thos. E. Dutro, the sum of \$808.50, for value received: negotiable and payable without defalcation or discount, at the banking house of Wm. H. Allen, Harrisonville, Missouri, and with interest from date at the rate of ten per cent. per annum.

(Signed,)

JEHIEL C. STEVENSON.”

To the allowance of this demand against the estate of said Stevenson, his administratrix offered a set-off as follows: “Thomas E. Dutro in account with J. C. Stevenson. To 183 lbs. bacon at 12 cents, \$21.96; to 185 lbs. lard at 12 cents, \$22.20; cash received of Stevenson for house and lots, \$400; cash loaned, \$1,200.” Total, \$1,644.16. The case was tried before the common pleas court—probate side. The court rejected the set-off and allowed the demand in favor of the defendant in error, and against the estate of Stevenson, for the full amount claimed. The plaintiff in error appealed to the circuit court of Cass county, and from thence the case was removed by change of venue to the circuit court of Bates county, where it was tried *de novo*. The plaintiff offered in evidence the note presented for allowance hereinbefore copied, and an assign-

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ment attached thereto, in words and figures as follows, to-wit:

"For value received, I assign the note executed by Jehiel C. Stevenson to Thomas E. Dutro, for about \$808.50 dated about ———, and now about, or nearly due, to Wm. Chandler, as collateral to pay a note executed by said Dutro, Chandler, and others, to one White, for about \$2,000, and now nearly, or about due, this June 4th, 1872. G. W. Feeley will deliver said note to said Chandler.

(Signed,)

CATHERINE E. DUTRO,

Administratrix of T. E. Dutro, deceased."

The main and controlling question which this case presents is, does the assignment to Chandler of the note in suit, by Catherine E. Dutro, administratrix of T. E. Dutro, deceased, confer upon him the legal right thereto, and can he maintain an action thereon by virtue of it against the administrator of Stevenson who was the maker of the note. The solution of this question depends upon sec. 40 p. 89, 1 Wag. Stat., which provides "that executors and administrators may assign the notes and bonds of the estate to creditors, legatees and distributees, in discharge of an amount of their claims equal to the amount of such bond or note." This section was brought to the attention of this court in the case of *Stagg v. Linnenfelser*, 59 Mo. 342, where it was held that the doctrine of the common law, that administrators took the property of the intestate in absolute ownership, "does not prevail in this State and that the power of the personal representative of the decedent, whether testator or intestate, to dispose of the assets, is limited and regulated by law." SHERWOOD, J., in delivering the opinion observes in respect to this section, that "as declaratory of the common law right of an executor or administrator to dispose of the personalty of his decedent such legislative permission would obviously be void of meaning. This being the case the section, whatever may be thought of its possessing sufficient comprehensiveness to embrace bills of

1. ADMINISTRATOR:  
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exchange may be safely and fairly restricted in its operation as to notes and bonds, and to preclude their transfer except when the statutory contingency arises or the will under which the executor acts so provides."

If, therefore, plaintiff Chandler was not at the time of the assignment, embraced in one of the classes of persons designated in the section, it passed nothing to him, and he took no right under it.

2. ADMINISTRATION: "creditor of the estate."

It is not pretended that he was a legatee or distributee, but it is claimed that he was a creditor, and that the assignment was made to pay his debt. Looking at the transaction in the light shed upon it by the terms of the assignment, Chandler was neither a creditor, nor was the assignment made to pay a debt due him from the estate of Dutro. It speaks for itself, and declares that the note was assigned "as collateral to pay a note executed by Dutro, Chandler, and others to one White, for about \$2,000, and now nearly or about due." The language employed is clear and there is no such ambiguity in it as would justify resort to parol evidence to explain or remove it. It shows that at the time of the assignment Chandler was not a creditor of Dutro's estate but that it was assigned to him as collateral to pay a debt to White, not then due, evidenced by the joint note of Chandler, Dutro and others. In the case of *Stagg v. Green*, 47 Mo. 500, it was held "that an executor is but a trustee: he receives nothing in his own right, but everything for the use of others." The method of performing this trust and the duties arising out of it are regulated by the statute. To give our sanction to any departure from the prescribed methods for the disposition of the assets of deceased persons, would result disastrously to all concerned in the proper administration of estates, and contravene the policy of the law. An exemplification of this is furnished in the case before us. Dutro's estate appears to have been insolvent, and in such cases creditors are entitled to a *pro rata* distribution of the assets. If the present proceeding should be upheld, the



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result would be that Chandler who, at the time the note was assigned to him, was not a creditor, but only in a position when he might become such in the event of his paying the joint note to White, would take an important and large asset of the estate to the prejudice of the rights of other creditors to have *pro rata* distribution. It, therefore, follows from what has been said that the declaration of law asked by defendant, to the effect that unless the note was assigned to Chandler in payment or discharge of a debt which was due him from Dutro's estate, the verdict should be for defendant, ought to have been given, and for the refusal of the court so to declare, the judgment will be reversed and cause remanded, in which the other judges concur.

REVERSED.

THE STATE OF MISSOURI to the use of SALINE COUNTY v. SAPPINGTON *et al.*, Plaintiffs in Error.

1. **State ex rel. Saline County v. Sappington, 67 Mo. 529, re-affirmed.**
2. **County Treasurer's Bond:** COUNTY MUST SUE ON, FOR SCHOOL MONEYS. An action on the bond of a defaulting county treasurer to recover school moneys, is properly brought by the county in the name of the State to the use of the county. The statute (Wag. Stat., § 42, p. 1251) does not require it to be brought to the use of the county clerk.
3. **Defect of Parties:** PRACTICE. Where the defect of want of a proper party to the suit is patent on the face of the petition, if it exists at all, it can only be taken advantage of by demurrer. If after a demurrer raising that point is overruled, the defendant answers over, he thereby waives the point, and cannot raise it anew by the answer.

*Error to Saline Circuit Court.*—HON. WM. T. WOOD, Judge.

*G. G. Vest* for plaintiffs in error.

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Wagner's Statutes, sec. 42, p. 1251, provides that \*

\* "on the forfeiture of such (county treasurer's) bond, it shall be the duty of the county clerk to collect the same for the use of the schools in the various townships. If such county clerk shall neglect or refuse to prosecute, then any freeholder may cause such prosecution to be instituted." Section 43 requires the treasurer to settle each year with the county clerk, and to account to him for all school moneys received. These provisions naming the clerk, exclude the county, and nowhere is any authority given for the institution of such suit by the county court. Nor is it true that the county of Saline has the power to sue as trustee of an express trust. The county court has the care and management of the school fund, but the county has nothing whatever to do with it. The bond was not given to the county, but to the State for the benefit of the school township. Neither has the county any interest in the fund. It is administered by the county court purely in an administrative capacity, not as the agent of the county, but in the performance of a duty specifically devolved upon it by the laws of the State. *Ray Co. v. Bentley*, 49 Mo. 242; *Reardon v. St. Louis Co.*, 36 Mo. 555; *Township Board v. Boyd*, 58 Mo. 279. The suit should, therefore, have been brought to the use of the county clerk.

*Thomas Shackelford* for defendant in error.

SHERWOOD, C. J.—Action instituted in the Saline circuit court against Sappington, late county treasurer of Saline county, and the other defendants as his sureties upon an official bond for \$20,000, executed November 12th, 1868. The bond was given to the State of Missouri for the safe keeping and disbursement of the school fund of Saline county, and was duly approved by the county court. On April the 4th, 1871, while Sappington was still county treasurer, the county court made an order requiring him

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as treasurer, to execute an additional bond for \$10,000 for the safe keeping and disbursement of the school fund, which bond was filed by Sappington on April the 7th, 1871, with new securities, and duly approved by the county court. This suit was instituted by the county after Sappington went out of office, to recover \$3,115.71 on the first bond, from him and his sureties, for an alleged deficit of that amount of school money, and judgment was rendered against defendants for that amount.

I. Relative to the point of defendants still continuing liable notwithstanding the execution of the second bond, we are still of the same mind as when deciding the case of the *State ex rel. Saline Co. v. Sappington et al.*, 67 Mo. 529. That case is decisive of this, in respect to the point referred to. We, therefore, rule that point against the defendants.

II. In reference to the legal capacity of the relator to institute to its use the present action, we have this to say: The county of Saline is the trustee of an express trust in regard to all ordinary suits relating to the school fund of that county. Bonds, for instance, for money loaned, are required to be executed to the county to the use of the township to which the fund belongs, 2 Wag. Stat., § 82, p. 1258; and if any suit be brought on such bond, it is brought in the name of the county to which it is executed. But when a suit, as in the present case, is brought on a bond of an official given to the State for the faithful observance of his duties toward the school fund, there the action lies in the name of the State, to which the obligors have bound themselves, and the State is the trustee of an express trust. 2 Wag. Stat., § 3, p. 1000; *Meier v. Lester*, 21 Mo. 112. If it be true that suits on official bonds must be brought in the name of the State, it would seem of necessity to follow, that under the exigencies mentioned in 2 Wag. Stat., § 42, p. 1251, although the county clerk, or a freeholder, may prosecute a suit on the bond of the defaulting treasurer, yet it by no means follows that

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such suit could be prosecuted in the name of the clerk, or freeholder, in total disregard of all known formulas of proper procedure. It has been expressly ruled in this State that in a suit on a note payable to the county to the use of a school fund, such suit is properly brought in the name of the county; *Barry Co. v. McGlothlin*, 19 Mo. 307; and in *Ray Co. v. Bentley*, 49 Mo. 236, it is held that while the county is not the owner of the school fund, yet the title thereof is vested in the county in order to effectuate the policy of the law concerning the appropriation and disbursement of that fund. If this be so, then it would appear peculiarly appropriate that the county should be relator in all actions where the State is, of necessity, a party in consequence of being the obligee in bonds given for the faithful performance of the official duties of the county treasurer in reference to school funds.

III. But if we concede that Saline county was not the proper relator, still this concession does not aid the defendants, and for this reason: If defendants were desirous of testing the question, they should have stood on their demurrer, since the alleged defect was patent on the face of the petition, and could only be taken advantage of by demurrer, and not by answer. 2 Wag. Stat., §§ 6, 10, pp. 10, 14, 15. When, therefore, the demurrer was overruled and defendants answered, they waived and abandoned whatever vantage ground they may have acquired by demurring; *Ware v. Johnson*, 55 Mo. 500; and could not raise the same question anew in their answer, in respect to a defect of parties. These considerations induce the affirmation of the judgment. All concur.

AFFIRMED.

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Ritter v. The Democratic Press Company.

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RITTER, *Appellant*, v. THE DEMOCRATIC PRESS COMPANY.

1. **Equity will Relieve against Fraudulent Judgment.** A court of equity will relieve against a judgment obtained against a defendant by a fraudulent combination between his co-defendants and the plaintiff; but this jurisdiction is rarely and reluctantly exercised. The case ought to be a very plain one to authorize interference.
2. **Disqualification of Convict as Witness.** A person who has been convicted of obtaining money under false pretenses, and has been sentenced to the penitentiary, is not a competent witness; and the fact that his sentence has been suspended by an appeal and order of supersedeas does not remove or suspend the disqualification.
3. **Agreement before trial to Release one Defendant, no fraud on his Co-defendants.** The fact that before the trial of a cause an agreement was made between the plaintiff and one of the defendants that the latter should be released on paying a very small part of the demand, does not, of itself, render a judgment subsequently obtained against all the defendants fraudulent as respects one of them who was not aware of the agreement.

*Appeal from Pettis Circuit Court.*—HON. WM. T. WOOD,  
Judge.

*E. J. Smith* for appellant.

*Philips & Vest* for the Democratic Press Company.

NAPTON, J.—During the political campaign of 1870, it was deemed desirable by a party termed "Liberal Republicans" to establish a newspaper at Sedalia, in the 5th Congressional District. Sundry candidates on this ticket, in conjunction with leading politicians, instead of starting such paper on an independent basis, concluded it more advisable to make an arrangement with a company who already owned a press to publish their proposed paper, and under this arrangement eight persons, among whom was the plaintiff, were named in the newspaper printed in pursuance of this arrangement as a board of managers. The canvass proved unsuccessful, and the company who owned the Democratic Press sued these managers for \$938.08 as ex-

penses of printing, &c. They dismissed as to one of the defendants, and recovered a judgment against the others, on 10th day of February, 1872. The plaintiff in this case was one of those against whom judgment was rendered. Upon an execution, he paid \$278.33, which was his share and that of one O'Bannon, who had died since the judgment. Why he paid O'Bannon's share is not explained.

The present action was commenced at the May term, 1875, of the circuit court. In this suit the plaintiff asks the interposition of the court, as a court of equity, either to grant him a new trial, or, at all events, to decree a return of the money he has paid, on the ground, that three of his co-defendants in the first suit had colluded with the plaintiff, and had made such arrangements with the plaintiff as would diminish or discharge their liabilities, without the knowledge of this plaintiff—that one of them, Saunders, had paid \$300 more than was credited to him and had a receipt for the same, but did not in his evidence on the first trial disclose this—that another of them, Richardson, was let off by paying \$25, under a previous agreement, not known to plaintiff—and that Smith, the third party named, had an arrangement with the press company by which his responsibility was limited to one-sixth. The plaintiff alleges that the defenses of these three defendants were sham defenses—and that he never discovered this until after he paid his \$278.33. He, therefore, asks that this judgment be set aside, and that he recover the \$278.33 from the plaintiff in the former suit or from his co-defendants, Smith, Saunders and Richardson.

The jurisdiction of courts of equity over cases of this sort is conceded. In *Duncan v. Lyon*, 3 John. Ch. 365, Chancellor Kent says: "It is a settled principle that a party will not be aided after a trial at law, unless he can impeach the justice of the verdict on grounds of which he could not have availed himself, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part." At



the same time it will be observed, as may be inferred from the cautious observation of Chancellor Kent, that this power in courts of equity is rarely and reluctantly exercised. All courts have recognized the wisdom of Lord Redesdale's remark that "it is more important that an end should be put to litigation than that justice should be done in every case." The amount involved in this case is \$278.33, or rather the half of that sum; it originated in a political campaign which turned out disastrously; it has once been submitted to a jury and the co-defendants of the present plaintiff, who were compelled to pay a much larger sum than the plaintiff, have acquiesced in this verdict, and it would, under these circumstances, require a very plain and palpable case, to authorize interference by a court of equity.

The plaintiff in this case does not charge that he was not liable as one of the managers of this newspaper. That question was passed on by the jury in the former case, and nothing is alleged in the petition in the present case to authorize its re-examination. But conceding his liability, the plaintiff insists that the collusion between the plaintiff in the original suit and Richardson and Saunders, two of his co-defendants, prevented him from producing, on that trial, testimony that would have materially reduced his pecuniary liability. Of course the circuit court excluded all evidence offered in the present case designed to show that the plaintiff was not responsible at all. The propriety of this exclusion could not be doubted. It was not pretended that any new evidence had been discovered on this point, or that the present defendants had done anything to suppress such evidence, or prevent its introduction in the former suit.

One of the principal grounds of complaint here, is that Saunders, one of the co-defendants of plaintiff in the former action, was not allowed to testify. He had been indicted for obtaining money under false pretenses, and had been convicted by a jury, but had appealed to this

court and obtained a supersedeas. He was brought to court, on the trial, by the sheriff, and offered as a witness, but the court excluded him. Our statute (Wag. St. 67, p. 465) provides that "every person who shall be convicted of arson, burglary, robbery or larceny in any degree in this chapter specified, or who shall be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of this chapter, shall be incompetent to be sworn as a witness, &c." Section 47 provides that "every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument or obtain from any person any money, &c., shall, upon the conviction thereof, be punished in the same manner and to the same extent as for feloniously stealing the money, &c." The only question is whether Saunders, sentenced as he had been to the penitentiary, though he had appealed to this court, where the judgment was reversed, was at the time he was offered as a witness, a competent one. We think the circuit court properly excluded him. He was convicted of a crime which disqualified him as a witness, and the subsequent reversal of that judgment by this court, could not be anticipated by the circuit court.

The question as to an alteration of a receipt given by Hull, the manager of the press company, who sued as plaintiff in the former trial, to Saunders, from \$200 to \$500 is a matter which we are not inclined to review. The judge who tried this case was satisfied, and for myself I agree with him. The original receipt is sent here in the record, and I think an alteration was made, but apart from this, the books of the company produced on the trial are strong, if not conclusive evidence, that the receipt was originally for \$200 and not for \$500.

It appears very clearly that Richardson, one of the defendants in the suit against plaintiff and others, had made an arrangement with the plaintiff, by which he was

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Ritter v. The Democratic Press Company.

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to be let off with merely nominal damages. But we do not see how this injured the plaintiff, or increased his liability. His evidence on this trial only goes to show that plaintiff was never liable, about which we have no doubt, but upon the question of the plaintiff's proportionate liability it sheds no light. The main question affecting plaintiff was decided against him on the first trial. That question was, whether he was responsible for the publication of his name as one of the managers of the paper printed as the organ of the Liberal Republicans. The evidence in the case seems to be clear that no such responsibility was assumed by him. Three years have passed, and now this suit is brought by the plaintiff, not to prove the injustice of the original judgment, but to show that he paid more than his share of the liabilities assumed by the directors of the newspaper printed by the Democratic Press Co. Section 9, (1 Wag. Stat. p. 270), declares that "it shall be lawful for every creditor of two or more debtors, joint or several, to compound with any and every one or more of his debtors, for such sums as he may see fit, and to release him, or them, from all further liability to him for such indebtedness, without impairing his right to demand and collect the balance of such indebtedness, from the other debtor or debtors, thereof and not so released, provided that no such release shall impair the right of any debtor of such indebtedness, not so released to have contribution from his co-debtors, as is, by law, now secured to him." We are unable to perceive how the discharge of Richardson could have injured the present plaintiff, and it is obvious from Richardson's testimony on this trial that his absence from the former trial could only have affected the plaintiff's liability, a point not now sought to be reopened, and could have had no influence on the extent of that liability, which is the only matter now complained of. Judgment affirmed.

AFFIRMED.

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The State ex rel. Pettis County v. The Union Trust Company.

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THE STATE *ex rel.* PETTIS COUNTY V. THE UNION TRUST  
COMPANY *et al.* Appellants.

**Taxation of Railroad Property.** Under the act of 1875, providing for the assessment of railroad property and the collection of taxes thereon, (Acts 1875, p. 120,) railroad companies were liable to pay taxes for the year 1876, on their property owned August 1st, 1876, at the same rates as were levied on all other property in the State owned August 1st, 1876, for the year 1877. They could not be assessed at the rates imposed upon other property for taxes of 1876.

*Appeal from Pettis Circuit Court.*—HON. W. T. WOOD,  
Judge.

*John Montgomery, Jr.,* for appellants.

*Geo. P. B. Jackson* for respondent.

NORTON, J.—This is an action commenced in the Pettis circuit court for the recovery of taxes levied upon the property of defendants. The petition alleges that there was duly assessed against the property of defendants certain taxes for the year 1876, and that \$2,681.99 (being the amount of certain levies to pay the interest on railroad indebtedness) remains due and unpaid, and asks judgment for that sum, with interest and penalties. The answer denies the averments of the petition. Upon a trial of the case judgment was rendered for plaintiff, from which defendants after motion for new trial, have appealed to this court.

The cause was tried upon an agreed statement of facts substantially as follows: That the defendants did, on the 1st day of January, 1877, make return for taxation of all property owned by them in the State on the 1st day of August preceding, in accordance with the requirements of sections 1, 2 and 3, of the act of March 15th, 1875, (Laws 1875, p. 120;) that the State Board of Equalization met on the second Tuesday of May, 1877, for the purpose of assessing railroad property, and upon the returns, certifi-

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cates and statements required by section 4 of the act above referred to, which were before them, they assessed the property of defendants and fixed the valuation thereof, distributing this valuation among the counties through which the railway runs, and designating the value of that in Pettis county at a certain sum, which was certified down to the county court of Pettis county by the State auditor, as required further by said act; that prior to all this, at the time required by law, in the year 1876, the county court of Pettis county levied certain rates of taxes, which were extended upon all property other than railroad property, which had been returned for taxation on the 1st day of August, 1875, for assessment for the taxes of 1876, which levy included certain rates to pay interest upon railroad indebtedness; that the county court, at the time required by law in 1877, levied certain rates of taxes, which were extended upon all property other than railroad property, which had been returned for taxation on the 1st day of August preceding, for assessment for taxes of 1877; that in this levy no rate was included to pay any tax upon railroad indebtedness; that the county court of Pettis county, in 1877, and immediately after receiving the certificate from the State auditor of the valuation placed upon the property of defendants, at their May session in 1877, as above stated, levied upon this valuation the same rates of taxes as they had levied in 1876 upon all other property returned for valuation and assessment on the 1st day of August preceding, or August 1st, 1875. This levy included, as above stated, certain rates to pay interest upon railroad indebtedness, and this was the only difference which existed between the rates levied by them in 1876 and 1877.

The defendants contend that the court should have levied upon the railway property the rates levied upon all other property in 1877, and refused to pay the excess as made by the difference in the two levies. The only question presented in the case is: What rate of tax was it proper for the county court of Pettis county, to levy upon

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the property of defendants returned January 1st, 1877, and assessed by the State Board of Equalization at its session in May, 1877? It is contended by defendants that the county court should have levied the rate levied upon all other property for the year 1877; while the plaintiff insists that the rate which was levied upon all other property for the year 1876, was properly levied on defendants' property. The question is to be solved by the act of 1873, p. 63, which provides for the assessment of railroad property and the collection of taxes thereon, and the act of March 15th, 1875, amendatory of the act of 1873 (Acts 1875, p. 120). Section 2, of the act of 1875, required the various railroads subject to taxation, through their presidents or other chief officers, to make a statement and return of their property, on or before the 1st day of January of each year, setting forth the amount and value thereof on the 1st day of August of the preceding year. Section 7 requires the State Board of Equalization to meet on the second Monday in May in each year, and from the statements and other evidence, they are required to assess, adjust and equalize the aggregate valuation of said roads. After said board has completed its work, section 11 makes it the duty of the State auditor to certify the action of the board to the clerks of the county courts of the proper counties, setting forth the description, location and valuation of all railroad property in such county as the same was assessed, equalized and apportioned by said board to such county and the various townships, cities, and incorporated towns therein, and also the amount of taxes due the State upon such railroad property in such county. Section 12 provides as follows: "it shall be the duty of each city council and board of trustees of each incorporated town in which any part of a railroad or the property appertaining thereto is situated, to certify in the month of May to the county clerk the rate per cent. levied by such city or incorporated town on all property for municipal purposes for the year preceding. The county court, upon



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receipt from the auditor of the certificate of the action of said board, shall immediately ascertain and levy the taxes for State, county, and municipal township, city and incorporated town and school purposes, on the railroad and the property thereof in such county, municipal township, city and incorporated town at the same rate as may be levied on other property; and the clerk of the county court shall, within ten days thereafter, certify to the secretary, or other chief managing officer in this State, of the proper railroad company the amount of taxes so levied for State, county, municipal township, city, incorporated town, and school purposes: specifying separately the rate and amount of State, county, municipal township, city, incorporated town and school taxes for the year for which said railroad property was assessed."

It is clear from the agreed statement of facts that the board of equalization which met in May, 1877, assessed, adjusted and equalized the valuation of the property owned by defendant on the 1st day of August, 1876, as returned by the statement made on the 1st day of January, 1877. It is equally clear from section 12, *supra*, that the county court of Pettis county, in acting upon the certificate of the State auditor as to the action of the board of equalization in assessing defendants' property, was only authorized, in levying taxes thereon, to apply or extend "the same rate as may be levied on all other property." It, therefore, follows that the rate of taxes levied for 1877, on all other property should have been extended as the rate properly chargeable on the property of defendants. Under the general revenue law all property owned by individuals on the 1st day of August, each year, is required to be returned for taxation, and the taxing year runs from the 1st of August of one year to the 1st of August the next; or, in other words, the tax imposed on the valuation of property owned on the 1st day of August, 1876, is designated as the tax of 1877, and is required to be paid in the year 1877. As this is the rule in regard to the rate of

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taxes levied upon all other property, it necessarily follows, under the express terms of the act of 1875, that it should have been applied to the property of defendant owned on the 1st day of August, 1876. We fail to perceive anything in the law providing for the assessment and collection of taxes on railroad property which would authorize county courts, in levying a tax on such property owned by a railroad company on the 1st day of August, 1876, to levy a rate of taxation for the year 1876, and imposed on all other property owned by others on the 1st day of August, 1875. On the contrary the statute expressly requires that the "same rate of taxes shall be levied on railroad property as may be levied on all other property." Sec. 12, Acts 1875, *supra*.

We have not deemed it necessary to consider either the Acts of 1871, 1874 or 1877, relating to the assessment and collection of taxes on railroad property to which our attention has been called by counsel, nor to discuss the question as to whether the railroad companies have or not escaped one year's taxation by reason of the various changes which have been made in the laws upon that subject. In the consideration of the question which the record presents, we have confined ourselves to the act of 1875, as that alone bears upon it, and by the terms of it we are forced to the conclusion indicated. It is true as contended that under this construction defendant will escape the payment of the special tax of 1876 imposed for the purpose of paying interest on the county debt, which the agreed statement of facts shows was paid for that year on all other property. While this is true we are powerless to remedy the wrong. The corrective must be afforded by the general assembly, if the act of 1877 is not full enough to embrace the case. We are therefore of the opinion that the instruction asked by defendants to the effect that the county court of Pettis county had no authority to levy the rate of tax for 1876 upon the valuation and assessment made by the board of equalization of railroad property

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Fulkerson v. Thornton.

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at its session in 1877, and that such levy was void, should have been given. For the action of the court in refusing to give it, the judgment is reversed and cause remanded, in which all concur except JUDGE HENRY, who expresses no opinion.

REVERSED.

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FULKERSON V. THORNTON, *Administrator, et al., Appellants.*

1. **Witness:** DEATH OF ONE OF TWO ADVERSE PARTIES. Where the contract sued on was made on the one side by two persons, one of whom has since died, that fact does not disqualify the adverse party from testifying in the case.
2. **Practice.** An objection to evidence comes too late when made for the first time in the Supreme Court.
3. **Instructions** upon a theory of the case not presented by the pleadings, are properly refused.

*Appeal from Henry Circuit Court.*—HON. F. P. WRIGHT,  
Judge.

*Wilson & Gantt* for appellants.

*M. A. Fyke* for respondent.

SHERWOOD, C. J.—Action for damages for breach of alleged contract for building a church; the plaintiff claiming that the defendants had employed him to build the church, and after its commencement and partial completion, had prevented him from going on with the work. Answer, a special denial; trial, and verdict for plaintiff.

I. Objection was made to plaintiff testifying on the ground that as Wm. T. Thornton, Sr., one of the alleged contracting parties, was dead, plaintiff was an incompetent witness. This objection was, we think, properly overruled. Thornton, the deceased,

1. WITNESS: death of one of two adverse parties.

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Fulkerson v. Thornton.

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was not the sole contracting party; that party was composed of Thornton and Hitch, the latter being alive at the time of trial. The legal party to the contract did not consist of a single individual, but of two persons—Thornton and Hitch. If the contract had been made with Thornton alone, and he was dead at the time of trial, a widely different question would be presented. The point is a new one in this State, and, consequently, any authorities cited from our own reports, or from those of other States, relative to a class of cases where the sole contracting party is dead, have not the slightest applicability. In Massachusetts, where the statute in regard to witnesses is substantially like our own, the ruling as to the competency of a witness under similar circumstances to those above detailed, has been in accordance with the views here enunciated. *Goss v. Austin*, 11 Allen 525; *Hayward v. French*, 12 Gray 453. The reason of the statutory prohibition, is the prevention of one person testifying where death has sealed the lips of his adversary; a reason which cannot possibly apply where there are other persons, still alive, who were co-contractors with the decedent, cognizant of all the facts as well as he was, able, therefore, to testify in opposition to the testimony of the witness objected to as being incompetent because of the death of one of the co-contractors. As the reason for the rule does not exist, no more does the rule.

II. In reference to the second alleged error, that of admitting in evidence the unsigned memorandum of the  
2. PRACTICE. the contract which Prottsman drew up and which Thornton and Hitch were to sign, it suffices to say that no objection was made to the introduction of that memorandum, and it is too late to object to its introduction now.

III. Relative to the third point of defendants: Their answer merely denied that they made the contract, and  
3 INSTRUCTIONS contained no allegation whatever, that they merely contracted as agents of, or as a committee for, the

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Moody v. The Pacific Railroad Company.

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Methodist Episcopal Church South; consequently, any instructions based upon the theory that they were not individually liable, were altogether foreign to the issues raised by the pleadings. *Bank v. Murdock*, 62 Mo. 70, and cases cited. Besides, the jury were expressly told that they were not to find for plaintiff, unless they agreed to be individually responsible; and there was evidence tending in that direction.

The case having been tried in accordance with the views here announced, we affirm the judgment.

AFFIRMED.

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MOODY, *Appellant*, v. THE PACIFIC RAILROAD COMPANY.

1. **Petition:** AMENDMENT. The original petition stated that the defendant, by its agents and servants, recklessly, carelessly and negligently caused one of its trains to strike, wound and kill one Moody. The amended petition, filed after the statutory time, charged that by the negligence and unskillfulness of the defendant's employees while running said train, the said Moody was struck and killed; *Held*, that the amendment set up no new cause of action.
2. **Evidence:** "TRAIN RULES." Certain "train rules" made by the defendant and another company, regarding a track used by them jointly, but 200 miles distant from the place where the injury occurred, *Held*, irrelevant and inadmissible.
3. **Crossing Railroad Track:** CONTRIBUTORY NEGLIGENCE. Moody, the postmaster at Webster station on defendant's road, was in the habit of carrying the mail to one of its mail trains which stopped at the station at about 8:40 p. m. His office was near the station but across the track. Hearing a train approach at about the time the mail train usually passed, he picked up his mail bags and started to cross the track to the platform. The train was then 1200 feet distant, but running at great speed. Relying upon its stopping, he continued on his way, and was struck by the locomotive and killed. The testimony was conflicting as to whether the bell was rung or the whistle sounded. The train was a freight train, which, on account of the mail train being behind time, had been ordered to go on without stopping, and passed Webster station at the very time

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the mail train would have passed had it been on time; *Held*, that Moody was guilty of contributory negligence, and his representative could not recover.

*Appeal from St. Louis Circuit Court.*—HON. J. K. KNIGHT,  
Judge.

*Davis, Thoroughman & Warren* for appellant.

*Thos. J. Portis* and *E. A. Andrews* for respondent.

NAPTON, J.—This action is brought by Anne Moody, the wife of Augustus Moody, to recover \$5,000 under the 2nd section of the damage act for the killing of her husband, occasioned by the negligence and unskillfulness of the employees of defendant.

The original petition stated that the defendant, by its agents and servants, carelessly, recklessly and negligently caused one of the defendant's locomotives, with a train of cars attached thereto, to strike, wound and kill the husband of the plaintiff. The amended petition, filed more than a year after the death of Moody, charges that by the negligence and unskillfulness of defendant's employees whilst running said cars, the said Moody was struck and killed. The amendment, in our opinion, sets up no new cause of action. It is true that the original petition charges the defendant with occasioning the death of Moody, but by the carelessness and negligence of its servants; and so it is substantially charged in the amended petition.

In order to determine the propriety of the rulings of the circuit court which tried the case, both in regard to the admission and exclusion of evidence, and in regard to its instructions to the jury, it may be well to state the facts, about which there was no question. The plaintiff's husband, Moody, was postmaster at Webster station on the Pacific Railroad. He was in the habit of handing over the mail about 8:40 p. m. to a passenger train which passed



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the station about that time for St. Louis. His store and post office were on the opposite side of the railroad to that where the depot was and platform from which the mail bags had to be handed over. There was evidence that he was in the habit of waiting till the last moment in starting from his office, and that he was rebuked for this carelessness or recklessness by some of the officers of the road. On the night when the fatal accident occurred, he heard a train about the time the mail train was expected and usually passed, picked up his mail bags, saw the approaching train at a distance of 1200 feet west, but supposing the train would stop, although running then at great speed, attempted to cross over in front of the locomotive and was killed. There is a conflict of testimony as to whether the bell was rung or the whistle sounded. It appeared that the train was a freight train which had been ordered, because the regular train was behind time, to go to St. Louis, and passed Webster station at the very time the mail train would have passed had it been on time.

In regard to the evidence on the trial, we are all of opinion that the court ought not to have permitted certain joint rules made by the defendant and the Kansas Pacific in relation to a track used jointly by both companies in Kansas, upwards of 200 miles west of Webster, to be read to the jury. They were entirely irrelevant. The object of this evidence was to leave the impression that this irregular train could only run through Webster at the rate of six miles an hour, whilst the evidence showed that it was going at the rate of from fifteen to thirty miles an hour. An instruction was asked on this subject, which we think was improperly refused.

3 CROSSING RAIL-  
ROAD TRACK: CON-  
tributory negli-  
gence.

The defendant offered to prove that the orders of train dispatchers always had precedence over time card rules, that this was the custom on all railroads, and was the custom and rule on the Pacific road. This was objected to

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and the objection was sustained. It is not deemed material to express any opinion on this point.

The defendant asked the following instruction: "If the deceased knew before he attempted to cross the track that the train was coming, and if before he got upon the track he could have seen the train twelve hundred feet west of the crossing, and actually did see and hear it before he got upon the track, then if he was injured by reason of any miscalculation as to the nearness of the train or its speed, the plaintiff must bear the consequences of any such miscalculation, and the jury will find for the defendant; although they may believe that the train was run at a careless and unusual rate of speed; and that no bell was rung or whistle sounded, or that Moody supposed the train in question was the mail train." This instruction was refused. For the plaintiff the jury were instructed that, "although they may believe from the evidence that the deceased may have been guilty of misconduct, or failed to exercise ordinary care and prudence while crossing the track of said railroad, which may have contributed to his death, yet if the said employees, or either of them, of the defendant were guilty of misconduct or negligence in running said train, or permitting the same to run, and such negligence or misconduct on their part was the immediate cause of the death, and with the exercise of proper care and prudence by said employees or either of them, said injury and death might have been avoided, the defendant is liable in this action." There is no doubt that railroad employees have no right to run over a person when he is on the track carelessly on his part, if it can be avoided, but the evidence of plaintiff in this case was, that the train was going at an unusual speed and on a down grade, and the engineer of locomotive, though seeing Moody approaching the track, could hardly be supposed to know that he designed crossing in front of the engine; nor is there any evidence to show that the train could have been slackened or stopped

3 CROSSING RAIL-  
ROAD TRACK:  
contributory  
negligence.

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in time to have prevented the disaster. As to ringing the bell or sounding the whistle, it was clearly of no importance, so far as Moody was concerned, since it is conceded that he heard and saw the train and was simply misled by supposing it was the mail train; and the only question is, who is to be responsible for the mistake and his recklessness in determining to cross over in front of the cars, which he could see were going at a rapid rate. Our opinion is, that the instruction asked by the defendant, applicable as it was to the facts in evidence, should have been given. The instruction given for the plaintiff may be abstractly correct, but there was no evidence to support it. There was no evidence to show that, "with the exercise of proper care and prudence by said employees or either of them said injury and death might have been avoided." *Harlan v. K. C. & N. R. R. Co.*, 65 Mo. 22, *Fletcher v. A. & P. Railroad*, 64 Mo. 480, *Stillson v. H. & St. Jo. Railroad*, 67 Mo. 671; *Dublin, Wicklin & W. R. Co. v. Slatterly*, 39 L. T. Rep. (N. S.) 265. The judgment of the general term, reversing the judgment of special term, is, therefore, affirmed.

AFFIRMED.

EXCHANGE NATIONAL BANK V. ALLEN *et al.*, Appellants.

1. **Motion for New Trial.** The Supreme Court will not review the proceedings below where the appellant has failed to file his motion for a new trial or in arrest of judgment within the time allowed by statute.
2. **Appeal:** *ENTRIES NUNC PRO TUNC.* A trial court may amend a record *nunc pro tunc* after appeal taken. The appeal deprives it of jurisdiction of the case but not of the records.

*Appeal from Boone Circuit Court.*—HON. G. H. BURCKHARDT, Judge.

Action on a promissory note for \$1,200, brought by

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the respondent against the appellants. The case was tried at the August term, 1874. Neither party requiring a jury, the cause was submitted to the court which rendered a verdict for the respondent for the amount of the note and interest. Appellants, thereupon, stated, by their counsel, that they would file motions for a new trial and in arrest, (assigning the usual reasons,) before the adjournment of the term, and upon such statement the court directed the entry to be made when filed, of the filing and overruling of said motions. The clerk made an entry in the record of the filing of the motions. The latter were not, however, filed. The trial court thereafter, at the November term, 1877, upon due notice and hearing of the parties, caused the entry prematurely, and by mistake, made by the clerk, to be corrected, *nunc pro tunc*, as to show that no motion in arrest or for a new trial had been filed in the cause.

Henry Flanagan and John H. Overall for appellants.

O. Guitar and Lay & Belch for respondent.

NORTON, J.—It has been settled by repeated decisions that this court will not review the proceedings had in a trial court when the party prosecuting his appeal or writ of error, has failed to file his motion for new trial or in arrest of judgment within the statutory time, thus giving the lower court an opportunity to correct its error. *Morgner v. Kister*, 42 Mo. 466; *State v. Marshall*, 36 Mo. 400; *Morgan v. January*, 52 Mo. 523; *Banks v. Lades*, 39 Mo. 406.

The record before us as amended by the *nunc pro tunc* entry made by the circuit court in November, 1877, shows that neither motion for new trial nor in arrest was filed at any time. It is, however, insisted, with much earnestness, that the trial court, after the cause had been transferred to this court by appeal, lost its jurisdiction of the cause and the record, and could not, therefore, lawfully make an order *nunc pro tunc*. This

1. MOTION FOR NEW TRIAL.

2. APPEAL: entries *nunc pro tunc*.

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position, we think, is not maintainable, and is overthrown by the case of *DeKalb Co. v. Hixon et al.*, 44 Mo. 341, in which it was held that it was within the power of the trial court to make such entries after appeal taken, and while pending in the appellate court: "That while by such appeal the trial court lost its jurisdiction of the case, it did not of its records. It had authority as well after as before the appeal to amend its records according to the truth, so that they should accurately express the history of the proceedings which actually occurred prior to the appeal." This case was followed and approved in *Jones v. St. Jo. Fire & Mar. Ins. Co.*, 55 Mo. 342. In all such cases, however, the record should show the facts authorizing the entry, and it should not be based on the memory of the judge or facts proved by affidavits apart from what is shown by the record. *Robertson v. Neal*, 60 Mo. 579; *Priest v. McMaster*, 52 Mo. 60; *State ex rel. v. Prime*, 61 Mo. 166; *Lexington & St. Louis R. R. Co. v. Mockler*, 63 Mo. 348.

It appears that the cause before us was tried in the Boone circuit court on the 28th day of August, 1874, and the entry in the record then made was that defendants filed motions for new trial and in arrest of judgment. It also appears that plaintiff gave proper and timely notice to defendants that he would, on the 21st day of November, 1877, while the appeal was still pending in this court, apply to the circuit court, of Boone, to correct the above record entry, so as to show that no motion for new trial or in arrest of judgment had been filed. This motion of plaintiff (defendants appearing thereto) was heard, and considered by the court and was sustained, and an order made correcting the entry as prayed for. "This being done on motion after due notice to the defendants and the correction having been made, we will presume that the court had sufficient evidence in its records to authorize the change in the entry." *Jones v. St. Joseph Fire and Marine Ins. Co.*, 55 Mo. 344. The cases of *Stewart v. Stringer*, 41 Mo. 400, and *Todd v. Cousins*, 35 Mo. 513 relied upon by

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Perry. v. Musser.

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defendants' counsel as establishing the doctrine, that after an appeal to this court the circuit court has no authority to make an entry *nunc pro tunc*, correcting the record, were before the court in the case of *DeKalb Co. v. Hixon, supra*, and in the case of *Jones v. St. Joseph Fire and Marine Ins. Co., supra*, and it was said in the latter case "that the objection taken that the court had no power after the cause was brought here by appeal or writ of error to make an entry *nunc pro tunc*, has heretofore been considered by this court and determined otherwise. The power of the circuit court to make the *nunc pro tunc* entry being thus established, and as the record thus corrected shows that no motion for new trial or in arrest had been filed, it necessarily results in an affirmance of the judgment.

*Morgner v. Kister, et. al.*, 42 Mo. 466, 52 Mo. 523. *State v. Marshall*, 36 Mo. 400. *Banks v. Lades*, 39 Mo. 406, 36 Mo. 313. Plaintiff having filed a remittitur for the sum of \$115, excess of recovery on the note sued upon, the judgment of the circuit court, less the said sum of \$115, is affirmed, the costs of the appeal being adjudged against plaintiff. *Miller v. Hardier*, 64 Mo. 545; 65 Mo. 535.

AFFIRMED.

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PERRY V. MUSSER, *Appellant*.

1. **Pleading : DAMAGES.** A petition which seeks to hold defendants liable for failure to proceed with diligence to collect a note, is fatally defective if it fails to allege that plaintiff was damaged by the failure.
2. **Pleading : CONVERSION.** If the cause of action relied on is the conversion of plaintiff's property to defendant's use, that fact should be directly alleged in the petition. It is not sufficient to allege it inferentially, or to state facts which constitute the evidence of conversion.



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3. **Conversion.** The facts alleged in the petition in this case, *Held*, not to constitute a conversion.

*Appeal from Livingston Circuit Court.*—HON. E. J. BROADUS, Judge.

*Shanklin, Low & McDougal* for appellant.

*Crosby Johnson* for respondent.

HENRY, J.—The substance of this petition, is that on the 15th day of November, 1866, plaintiff and defendant entered into a co-partnership for the purpose of dealing in hogs; that as such partners, on the 21st day of December, 1866, they sold a lot of hogs to one Hersey for \$2,362.50, for which Hersey executed two notes for \$1,181.25 each, payable one in six, and the other in twelve months from that date with interest; that on the 8th day of January, 1867, they made a final settlement, and accounting as co-partners, and dissolved their co-partnership, which said settlement and accounting was reduced to writing; that by the terms of said written agreement the defendant was to take said notes, which should be his property on condition that they were paid when due, and if defendant collected the two notes he was to pay to plaintiff \$560 with interest; that defendant, as soon as said notes became due, should proceed with due diligence to collect the money, and if not collected when due, the notes were to be the property of plaintiff and defendant, who were to equally bear any loss upon them; that said notes were transferred and delivered to defendant, that one of them was paid at maturity; that defendant did not use due diligence in presenting the other note when it became due; that defendant afterwards instituted suit upon it in the State of Kansas, and in 1869 obtained a judgment thereon, and in 1870, without the knowledge or consent of plaintiff, released said judgment, took other notes from Hersey payable to himself for the amount, and a mortgage on land to secure

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the same; that Hersey has since paid a portion of said debt, but how much, plaintiff is not advised; that by reason of defendant's failure to use diligence to collect said notes, and of his conversion of the same to his own use and releasing said judgment, he became liable to pay to plaintiff said sum of \$560.

The defendant's answer is an admission of the facts alleged, except a failure on his part to exercise proper diligence, and a denial that the settlement made on the 8th day of January, 1867, was reduced to writing, and avers that the only agreement between the parties reduced to writing was the following: "This agreement made this 8th day of January, 1867, between Solomon Musser and D. R. Perry, of Caldwell county, Missouri, Witnesseth, that, whereas, said Musser and Perry have sold a lot or lots of hogs to F. P. Hersey and taken notes therefor, dated December 21st, 1866, and payable to Hall and Rice, one at sixty days for \$1,181.25, and one at ninety days for \$1,181.25, and upon settlement it appears that there is now \$560 due from said Musser to said Perry, should these notes be paid to said Musser or his order; now, therefore, it is agreed between the said parties that said notes and the proceeds thereof, are to be the property of said Musser, conditioned upon their payment when due, and if he collects them, then he is to pay said Perry the said sum of \$560, and the balance of the proceeds he is to retain. But should default be made in the payment of said notes, and the same be not collected when due, then said notes are to be the property of said Musser and Perry jointly, and they are to bear the loss upon them equally, share and share alike."

He also denied that the notes were assigned or delivered to him, and alleged that they were payable to Hall & Rice, and indorsed by them to plaintiff, but left in the possession of said Hall & Rice in the State of Kansas. The replication admitted the written agreement set out in the answer to be the same alleged in the petition. On the trial

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plaintiff introduced as evidence the said written agreement and rested. Thereupon defendant asked the court for the following declaration of law, which was refused. "Under the pleadings and evidence in this cause the plaintiff cannot recover, therefore the finding and judgment ought to be for defendant."

It is difficult to determine what is the cause of action relied upon by plaintiff for recovery. The petition alleges

1. PLEADING: a neglect to present the note for payment,  
damages. and seems also to rely upon a conversion of it by defendant to his own use. It does not state a cause of action based upon defendant's failure to exercise due diligence to collect the note, because it is not alleged that plaintiff sustained any damage whatever in consequence of such neglect. If he obliged himself by the written agreement of January 8th, 1867, to proceed with diligence to collect the note, a failure to do so did not necessarily entitle plaintiff to a recovery against him. It does not allege that Hersey was solvent when the note became due, and became insolvent afterwards, and that plaintiff was, therefore, damaged by defendant's negligence, or that he was otherwise damaged thereby.

With regard to the other cause of action which we may assume the pleader intended to state, it is not directly

2. PLEADING: con- alleged that defendant converted the note to  
version. his own use, and all that is said on that subject is, "that by reason of defendant's conversion of the two said notes of \$1,181.25, each, to the defendant's own use, and of his failure to use due diligence in the presentment and demand of payment of said two notes, and releasing the aforesaid judgment, &c., defendant has become liable to pay to plaintiff said sum of \$560, &c." It states mere evidence which, no doubt, the pleader regarded as proving a conversion, but this is not sufficient. "If in trover the plaintiff alleges a demand and refusal, but omits to aver a conversion, the declaration is ill, the demand and refusal being only evidence of a conversion, which is the

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gist of the action." *Watriss v. Pierce*, 36 N. H. 239; *Chitty* on Pl., (16 Am. Ed.) p. 248.

But assuming that the petition is good in form, do the facts alleged and relied upon as a conversion constitute a

3. CONVERSION. conversion of the notes by the defendant to his own use? If by the agreement of January 8th, 1867, the property became the property of defendant, then he could not be guilty of a technical conversion of the notes to his own use. One cannot, by converting his own property to his own use, give a cause of action to another. If the notes continued the property of the partnership, notwithstanding that agreement, the acts of defendant in regard to the judgment obtained by him were not necessarily a conversion, for all that he did he may have done as a partner, and in that case it inured to the benefit of the firm. There is no allegation to the contrary in the petition. The plaintiff had no right to recover on the agreement, unless the notes were collected, or unless said agreement bound plaintiff to use diligence in endeavoring to collect the same, and he failed to use such diligence to the damage of plaintiff. It is not alleged that the notes were paid in full at or after maturity. The pleader seems to have attempted to blend in one count two distinct causes of action, neither of which is sufficiently stated.

The court should have sustained the demurrer, and the judgment is reversed and the cause remanded. All concur.

REVERSED.

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REINDERS V. KOPPELMANN *et al.*, Appellants.

1. **Devise:** LIFE ESTATE, NOT ENLARGED INTO A FEE BY POWER TO SELL. The will of a testator, after devising all his real and personal estate to his wife during her life, contained this provision: "The foregoing bequest is made under the express proviso that my said wife \* \* will carry on and continue my business with my co-partners; but I will that no part of my real estate, still less the whole of it, be sold or otherwise disposed of before the lapse of twenty-five years. \* \* After the decease of my said wife, the property then left shall be divided as follows," &c.; *Held*, that the power thus impliedly given to sell the real estate did not enlarge the wife's life interest to an estate in fee.
2. **Effect of Adoption on Descent.** On the death of an adopted child, his estate will go to his relations by blood, and not to those by adoption; and this, even, where the estate which so descends has been derived from the adoptive parent. The statute of adoption (Wag. St. p. 256), has not changed the general rules of descent, established in the general statutes on that subject.
3. **Heirs.** A testator devised a life estate in his property to his wife, and then declared that after her death a certain portion of it should go in remainder "to the nearest and lawful heirs" of his wife. *Held*, that the word *heirs*, as here used, meant those persons who should be her heirs at the time of her death and not those who should be her heirs apparent at the testator's death.
4. **Partition.** CONTINGENT ESTATES. A partition will not be refused because there is a contingent estate in the land, which may hereafter be vested in persons not yet *in esse*. The parties not *in esse* are represented by those who take subject to their rights, and the partition or sale is conclusive, so far as third persons or purchasers are concerned.
5. **Partition Sale Conclusive against Persons not in Esse:** CONSTITUTIONALITY OF STATUTE. The 4th section of the Partition Act (Wag. Stat. p. 967,) provides: "In case the share or quantity of interest of any of the parties \* \* be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be contingent, so that such parties cannot be named, the same shall be so stated in the petition." The 34th section (p. 971) provides that the sheriff's deed upon a sale in partition "shall be a bar against all persons interested in such premises who shall have been parties to the proceeding, and against all other persons claiming from such parties or either of them." *Held*, that these provisions do not, as against persons not *in esse* at the time a partition is made, dispense with the

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constitutional right of every man that his property shall be taken only by due process of law, and are not, as against such persons, unconstitutional.

*Appeal from St. Louis Circuit Court.*

This was a suit for the partition of certain real estate in the city of St. Louis. The petition showed that the land had belonged to one John H. Koppelman, who had died leaving a widow, Anna, but no children of his own; that in his life-time he had adopted a child named Johanna, the daughter of Robert Jaeschke and Eliza, his wife; that at his death, Koppelman had left the will which is set out in the opinion of the court, and which was duly probated; that Johanna died, before the commencement of the suit, intestate, unmarried and without issue; that her father, Jaeschke and his three sons survived her and were then living; that plaintiff, Reinders, had intermarried with the widow Koppelman, and by certain conveyances set out in the petition had acquired all her interest in the land; that he had also acquired all the interest of Robert Jaeschke; that Mrs. Reinders (late Koppelman) had never had any children of her own, and that she was still living. Certain persons were named as heirs at law of the testator, and certain others as the "ostensible heirs" of Mrs. Reinders, and these persons, together with the three brothers of Johanna, deceased, were made defendants.

The defendants demurred to the petition, for that it appeared that as to one-half of the fee of the lands described, there was a contingent remainder in favor of the persons who, upon the decease of the tenant for life, (Mrs. Reinders,) would be her lawful heirs; that, therefore, for the want of parties to make a present decree of partition and sale effectual and binding upon these heirs when they came into existence, there could be no partition and sale then.

The circuit court, at special term, sustained this demurrer, and final judgment being entered for the defend-



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ants, plaintiff appealed to the general term, where the judgment was reversed. Defendants then appealed to this court.

*Hitchcock, Lubke & Player* for appellants.

Under section 1 of the partition act, (Wag. Stat, p. 966,) there can be no partition of this property until the heirs of Mrs. Reinders, the tenant for life, are known, and they cannot be known until her death. The law contemplates a partition only where all the parties who have interests are *in esse*, and they must be either "joint tenants, tenants in common or co-partners by courtesy or in dower, in fee for life or for years." In the case at bar this one-half of one-half of the fee of this property is at present vested in the heirs at law of the testator, John H. Koppelman, but may at any moment vest in the persons who, at the death of the widow, (now wife of respondent,) will be her heirs.

Again, to make a partition, or a sale in partition effectual, the court must have before it all of the parties and all of the property. How can the court have all the property before it if any of the interests are not represented for the want of parties not yet *in esse*? These absent parties cannot be bound by the decree. "Sale in partition imports no warranty of title. The deed simply conveys the interest of the parties to the proceedings." *Cashion v. Faina* 47 Mo. 133; *Mallock v. Bigbee*, 34 Mo. 354; *Schwartz v. Dryden*, 25 Mo. 572; *Owsley v. Smith*, 14 Mo. 153.

2. Section 5 of the partition act, (Wag. Stat., p. 967,) in so far as it attempts to bind these persons not yet *in esse* by a decree in partition, is void under the constitution of this State, section 30 of the bills of rights, which reads as follows: "That no person shall be deprived of life, liberty or property, without due process of law." Under this section of the statute, and the cases cited by counsel for re-

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spondent, it is proposed to sell this property in partition without giving these unknown parties a voice in the matter; clearly, this is taking their property without due process against them. The cases cited for respondent do not pass upon any such constitutional provision, and, therefore, are no authority here.

3. That there is a contingent remainder in favor of the heirs of Mrs. Reinders, formerly Koppelman, is determined by the question, did she take a life estate in this realty? It is not necessary to inquire now whether she took an absolute estate in the personalty or not. That she took only a life estate in the realty is clear from the express language of the will. There is not even an express power of disposition beyond that. The words "then left" cannot be held to imply a power of disposal beyond the payment of debts, and the support and maintenance of the tenant for life. The perishable nature of some of the personalty also gives a meaning to the words "then left." *Gregory v. Cowgill*, 19 Mo. 415; *Carr v. Dings*, 58 Mo. 400; *Rubey v. Barnett*, 12 Mo. 1; *Brant v. Virginia C. & I. Co.*, 93 U. S. 326.

4. Our statute of adoption (Wag. Stat. p. 256), gives the right of inheritance to the child, but does not give the right of inheritance from the child to the adopted parent. The Statute of Descents (Sec. 1, p. 529, Wag. Stat.) provides, that "when any person having title to any real estate \* \* \* of inheritance shall die intestate as to such estate, it shall descend \* \* \* if there be no children, or their descendants, of the person so dying intestate to his or her father, mother, brothers or sisters." It does not say adopted father or mother. Again: the Statute of Descents makes no distinction as to how the person so deceased acquired the property. If he or she have an estate of inheritance—no matter how acquired—and die intestate, such estate shall pass to the persons named above. Any argument that because this vested estate in Johanna Jaeschke came from her adopted father

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it should go to her adopted mother, exclusive of the persons named in the statute, has no force, because there is no distinction of property in the statute of descents. Further, the statute of adoptions in terms confines its operation to the persons "executing the deed of adoption." The petition does not show whether Mrs. Reinders signed the articles. It is certain that the minor brothers of Johanna did not sign it. They are, therefore, not affected by it, and in no event can they be deprived of their right to inherit equal shares with the adopted mother of Johanna, if it may be held (which we utterly deny) that Mrs. Reinders can take a share as "mother" under the statute of descents.

*A. J. P. Garesche* for respondents.

1. The demurrer was properly overruled, even if children should be born of plaintiff's wife; because though not now *in esse* they would be barred by the decree. Freeman on Judg., § 306; Calvert on Parties, 15 vol. Law Lib., p. 31, § 51-52; *Finch v. Finch*, 1 Vesey Jr., 534; *Wills v. Slade*, 6 Vesey Ch. 498; *Mead v. Mitchell*, 17 N. Y., 210; *Academy of Visitation v. Clemens*, 50 Mo., 171.

2. That partition can be made, though some of the interests are contingent or in remainder or reversion; Wag. Stat. p. 966, § 1; *Gaskill v. Gaskill*, 6 Simons 186; *Scoville v. Hilliard*, 48 Ills. 453; *Scoville v. Hilliard*, 52 Ills. 449; *Baylor's Lessee v. Dejarnette*, 13 Grattan 166. By section 5, partition act, if the interest of any one "be unknown to petitioner, or be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be contingent, so that such parties cannot be named," the same shall be so stated in the petition. This provision clearly contemplates that this uncertainty, either because parties are unknown, or their interests contingent, shall not defeat the right of partition. It expressly authorizes the prosecution of the

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partition; and this becomes the more clear by reference to section 40, which directs the investment of the shares of the parties unknown. It is, then, too clear to admit of a question that even if the will contemplates that those who shall be "heirs" of the wife at the time of her death shall take, that would not defeat the prosecution of the suit. The law contemplates no follies. If, therefore, it would be the children of Mrs. Reinders, should she have any, the petitioner complies with the statute in stating the fact, and no publication is necessary to bring them in to make the decree valid. For publication is to bring in parties *in esse*, to enable interested parties, not served, to come in and to defend their interests. This is the end and aim of a publication; and publication is useless, and it is a farce to notify parties who are stated in the petition not to be *in esse*.

3. The will does not intend that if Mrs. Reinders should, in the future, have children they should take an interest. It does not say "children," but "heirs;" and "heirs" must here be construed to mean ostensible heirs at the death of the testator. *Cox v. Betzhooover*, 11 Mo. 146; *Academy, &c. v. Clemens*, 50 Mo. 171; *Green v. Sutton*, 50 Mo. 193; *Cornelius v. Smith*, 55 Mo. 533; Redfield on Wills, (3 Ed.) 57, § 4; *Collier's Will*, 40 Mo. 299; *Jamison v. Hay*, 46 Mo. 553; *Flint v. Steadman* 36 Vt. 210; *Huss v. Stephens*, 51 Pa. St. 288.

4. Mrs. Reinders, in respect to the property of the adopted father, was the heir of the adopted daughter Johanna. The will speaks of her as "*our* adopted daughter," and says that the bequest to her is "provided she will be a good girl, and demean herself such to her parent." If intention should prevail, clearly the language would indicate that the change of name from Johanna Jaeschke to Johanna Koppelman was the culmination of their paternal feelings in her regard. They cherished her, treated her and loved her as their own child, as much so as if she had sprung from their own loins. Very surely in making

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this bequest, the testator never contemplated that the brothers and sisters, still less the father, should share in his estate. See also *Graham v. Bennett*, 2 Cal. 506; *Rices v. Sneed*, 25 Ga. 613; *Lunay v. Vantyne*, 40 Vt. 504; *Fusilier v. Masse*, 4 La. 427; *Vidal v. Commagere*, 13 La. Ann. 519.

In *Lunay v. Vantyne*, *supra*, it is said "there is no difference between adopted children and other children." Why then not the right of inheritance? Particularly in a case like this, where the property comes from the adoptive parent.

Parental and filial rights and duties are reciprocal. If the parent frees his child, he has no claim to its services; nor may the latter longer look to the former for support. If the child serves its father, the father's duty is to furnish the child with the necessities incident to its station in life. If denied these, the (minor) child may appeal to strangers; and the claims of these last will be by law enforced against the father. If, therefore, these rights be reciprocal, and the adopted child by reason of its adoption inherits from the adoptive parent, why should not the mother, at least, in respect to the property from the adoptive father inherit from the child? For ourselves we are at a loss to answer the question. To deny it to the parent, is to deny it to the child; to deny it to the child is to emasculate the law of adoption, and oftentimes work most serious injustice. Few persons make wills, even where wills are necessary. The adopted child would be without protection except by a will; and after having been treated, caressed by wealthy foster parents, reared in luxury, by the death of the foster father, and his neglect to make a will, thrown upon the world.

*Jeff. Chandler* for respondent, argued that the widow took a life estate, enlarged by the power of sale into a fee, citing *McKenzie's Appeal*, 41 Conn. 607; *Attorney General v. Hall*, Fitzg. 314; *Jackson v. Bull*, 10 Johns. 20; *Rams-*

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*dell v. Ramsdell*, 20 Me. 288; *Harris v. Knapp*, 21 Pick. 416; *Homer v. Shelton*, 2 Met. 202; 2 Story Eq. Jur., § 1073; *Wright v. Atkins*, 17 Ves. —; 2 Hilliard on Real Prop., 581; *Carr v. Dings*, 58 Mo. 405; 2 Redfield on Wills, 659, note 56; *Executors v. Seeger*, 6 C. E. Green —; *Carter v. Reddish*, 5 Cent. Law Jour. 492; *Brant's Will*, 40 Mo. 279; *Davis v. Boggs*, 20 Ohio St. 566.

NAPTON, J.—The principal questions discussed in this case involve the proper construction of the will of Koppelman, which is as follows:

I, the subscriber, John H. Koppelman, of the city and county of St. Louis, State of Missouri, being of sound and disposing mind and memory, and feeling naturally solicitous to settle my worldly affairs, with which Providence has blessed me, in such manner as to prevent all future doubts and difficulties, declare and publish this, my last will and testament: 1st. I will that all my just debts and funeral expenses be fully paid by my executrix hereinafter mentioned, as soon as convenient after my decease. 2nd. I hereby give and bequeath to my beloved wife, Anna Koppelman, all my estate, real and personal and mixed, for and during her life time. 3rd. The foregoing bequest is made under the express proviso that my said wife will be a mother indeed to our adopted daughter, Johanna, now six years old, that she will bring her up and educate her according to her best means; also that my said wife will carry on and continue my business in company with my co-partners; but I will that no part of my real estate, still less the whole of it, be sold or otherwise disposed of before the lapse of twenty-five years, and should it appear hereafter that the business cannot be carried on with the present capital, then said business shall be reduced to such an extent as to bring it into conformity with the present capital. 4th. After the decease of my said wife, Anna Koppelman, the *property then left* shall be divided as follows: One-half shall be given to our said adopted daugh-



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ter Johanna, provided she will be a good girl and demean herself as such toward her parent, and the other half shall go to the nearest and lawful heirs of mine and that of my said wife, share and share alike. I hereby nominate and appoint my said wife, Anna Koppelman, to be executrix of this my last will and testament. In witness whereof, I have hereunto set my hand and seal, at the city of St. Louis, this seventh day of May, 1869.

(Signed)

JOHN H. KOPPELMANN.

The object of all courts in the construction of a will is to ascertain the intention of the testator, where it is possible. It unfortunately happens that where wills are written by persons unskilled not merely in law but in the language in which their intentions are expressed, there are found such contradictory clauses as render it exceedingly difficult to ascertain what is the leading, prominent and controlling object of the will. In such cases courts have established some rules, and some exceptions to them, by which they will be guided—all of them with a view to give effect to the intentions of the testator, as gathered from the entire will.

In this case, the will of Koppelman gives to Mrs. Koppelman all his estate, real and personal, for and during her life-time. In a succeeding clause she

1. DEVISE: life estate, not enlarged into a fee by power to sell.

is impliedly authorized to sell any part of his real estate after the lapse of twenty-five years to enable her to carry on his co-partnership business and to educate the adopted daughter. The property left on the decease of his wife he then directs to be given to certain persons, clearly designated. It is insisted that this power impliedly given to sell the real estate, enlarges her interest in it from a life estate to a fee. The answer to this may be best given in the language of Sir Wm. Grant, in *Bradly v. Westcott* (13 Ves. 445). "The distinction is perhaps slight, which exists between a gift for life with a power of disposition superadded, and a gift to a person indefinitely with a superadded power to dispose by deed

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or will. But the distinction is perfectly established, that in the latter case the property vests. A gift to A and such persons as he shall appoint, is absolute property in A without any appointment; but if it is to him for life, and after his death to such person as he shall appoint by will, he must make an appointment in order to entitle that person to anything." The same Judge decided in the case of *Barford v. Street*, 16 Ves. 135, that where there was a gift for life to A, with a power of appointment by deed, or writing or will, A had the entire estate. "An estate for life with an unqualified power of appointing the inheritance," said the Master of the Rolls, "comprehends everything. By her interest she can convey her life estate. By this unlimited power she can appoint the inheritance. The whole fee is then subject to her disposition." It will be observed in reference to this last decision, which upon a cursory view might seem to conflict with the first, that although the devisee is given an express estate for life, yet by subsequent clauses an unlimited power of disposition is given her either by deed or will, and for no specific object. A party cannot give an unlimited dominion of his property to one and at the same time a limited right in it to another; in other words, a remainder cannot be engrafted on a fee.

The distinction taken in *Bradly v. Westcott*, is recognized by this court as early as the case of *Rubey v. Barnett*, 12 Mo. 1, and subsequently in *Gregory v. Cowgill*, 19 Mo. 415, and *Green v. Sutton*, 50 Mo. 190. It is also distinctly announced in *Jackson v. Robins*, 16 Johns. 587. The result is that where there are inconsistent devises the courts are compelled in some cases to enlarge, in others to cut down the estate, in order to carry out the leading and prominent objects of the testator as indicated by a view of the entire will and all its various provisions. In the present case, however, there is no necessity for enlarging the estate for life, given to Mrs. Koppelman into a fee in order that she may sell a part or the whole of the real estate if the man-

ufacturing business in which Koppelman was a co-partner required it, since such a power may well co-exist with an estate for life in Mrs. Koppelman. Admitting that the prohibition against any sale for twenty-five years may be regarded as though it had been only for one year, or had been entirely omitted, the power to sell was limited to a specific purpose and was unaccompanied with a power to dispose of by devise. On the contrary, the property thus left at the death of the wife, was devised specifically to his adopted daughter and the heirs of his wife and himself, in certain proportions named, and the estate consisted of personal property as well as realty. In the case of *Gregory v. Cowgill*, 19 Mo. 415, an express estate for life was given to the devisee without any power of disposition either by deed or will, except what might be implied by the words in the devise over which were "what remains of my estate, both real and personal, after the death of my wife," and it was held that an express estate for life could not be converted into a fee by words of mere implication, unless the general intent of the testator required it. In that case there was no express power given the devisee to sell; in the case now before us such a power may be inferred from the third clause of the will, and the words in the fourth clause, "the property then left," may very well include the personal and real property not disposed of under the power in the third clause.

The case of *Ramsdell v. Ramsdell*, 21 Me. 288, is cited as an authority conflicting with these views, but we do not so understand it. Judge Shepley states it to be a settled rule of law that if the devisee have the absolute right to dispose of the property at pleasure, the devise over is inoperative, but that where the testator gives the first taker an estate for life only by express words and annexes to it a power of disposal on a certain event or for a certain purpose, the life estate is not thereby enlarged into a fee. In that case there was no express estate for life given to the wife, except in regard to certain plate and jewels, and the

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will was construed to give her an absolute estate in the land on the strength of the words "if any remains" in the devise over. At the same time the court distinctly recognized the doctrine of *Bradly v. Westcott*.

In *Harris v. Knapp*, 21 Pick. 416, the will provided, after directing the sale of all the real estate of testatrix and the payment of her debts, that what remained of real and personal estate should be given, one-half to her daughter M., (a married woman,) for her use and disposal during her life, and whatever remained at her death to M.'s two daughters. This was held to be not merely a bequest of the income of one-half of such residuary fund during her life, but that M. might, in her life-time, dispose of the principal either in whole or in part. The case seems to have been decided on the principles announced by Sir Wm. Grant in *Barford v. Street*. The bequest was confined to personal estate, and the only question was whether the words "for her use and disposal during her life" limited her to the income of this fund, or gave her a power to dispose of the entire property at pleasure, provided it was done during her life. The court adopted the latter view, and as such a disposition had been made by her and her husband, its validity was sustained.

In *Davis v. Boggs*, 20 Ohio St. 550, the testator bequeathed to his wife "in trust only and during her natural life only" certain rents of real estate, interest on debts due him and dividends on his bank stock, with a proviso that the debts and bank stock should not be diminished. The only question in that case was, whether the legatee took an absolute beneficiary interest in these dividends, or only a trust estate in them, and the court held that, looking into the entire will, it was plain that the testator did not use the words "in trust only" in their technical sense, and that they must be rejected as unmeaning, and that the wife took an absolute property in the dividends, rents and interest so bequeathed to her. So that in this case a trust estate was raised to a beneficial one, as in *Baxter v. Bowyer*,

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19 Ohio St. 490, the same court cut down a fee simple to a life estate—both on the same principle, that looking through the entire will and finding other provisions entirely inconsistent with such clauses, they were necessarily rejected or modified in order to carry out the general intent of the testator.

In regard to the will now under consideration, although obviously written by one more accustomed to a foreign language than our own, we do not find any difficulty in reconciling the life estate of the wife, which is very clearly given her, in all of his property of every description, with the subsequent clauses in which we assume that a power to sell the real estate is given her, manifestly with great reluctance, and restricted to specific purposes and postponed to a very remote period. Such a power we have seen from the current of authorities, only a few of which I have referred to, and those chiefly such as the counsel for plaintiff have argued as maintaining a different doctrine, does not, of itself, enlarge a life estate given in terms to a fee. It is not material in the present action, which is for a partition, whether this power of sale of the real estate is properly inferable from the terms of the third clause of the will or not. Mrs Koppelman has remarried, never has exercised the power, has conveyed all her interest in the estate to Eugene D. Garesche, and Mr. Garesche has conveyed it to the plaintiff, Reinders, now the husband of Mrs. Koppelman. So that the only importance it has is in connection with its effect upon the proper construction of the second clause in the will, and we are satisfied that it does not enlarge the life estate given in this clause to a fee.

Assuming that one-half of the remainder vested in Johanna, the adopted child, it is insisted that Mrs. Koppelman is her heir, and not her father, Jaeschke, and her brothers. It is urged, that as Johanna would inherit from her mother, by reason of the deed of adoption, the mother should for the same reason in-

2. EFFECT OF ADOPTION ON DESCENT.



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herit from her. But is not the assumption that the adopted child would be heir to the mother a mistake? Our statute on this subject (1 Wag. Stat. p. 256,) is as follows: Sec. 1. "If any person in this State shall desire to adopt any child or children, as his or her heir or *devisee*, it shall be lawful for such person to do the same by deed, which deed shall be executed, acknowledged and recorded in the county of the residence of the person executing the same, as in the case of conveyance of real estate. Sec. 2. A married woman, by joining in the deed of adoption with her husband, shall, with her husband, be capable of adopting any child or children. Sec. 3. From the time of filing the deed with the recorder, the child or children adopted shall have the same right against the person or persons executing the same for support and maintenance and for proper and humane treatment, as a child has, by law, against lawful parents; and such adopted child shall have, in all respects, and enjoy all such rights and privileges as against the persons executing the deed of adoption. This provision shall not extend to other parties, but is wholly confined to parties executing the deed of adoption."

Passing over the provision which authorizes one to adopt a child as *devisee*, the meaning of which is somewhat obscure and need not be investigated in this case, it is clear, at least, that either the husband or wife may adopt a child, or both, and the rights of the child, which are declared to be the same as against natural (lawful) parents, are limited to the one executing the deed of adoption. In this case Mr. Koppelman alone executed the deed (so the petition states), and it is not clear that Johanna could have inherited from the mother, had she been seized of a separate estate. This right is given only as against the person executing the deed. This, however, is not material to the present inquiry. It is not a question whether Johanna would have inherited from either the father or mother, but who is to inherit from her. The statute on the subject evidently provides for the heirship of the child from the



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father or mother who executes the deed of adoption. Beyond this it is silent. In the consideration of this question, it is not material from what quarter the estate of the child is derived. It may seem great injustice that the property derived from one source should go in a channel never contemplated by the donor; but we may suppose in this case, that the property vested in the adopted child came from an entire stranger to the blood of either her natural or adopted parents, and the same rule must prevail. Was it the intention of the Legislature to sever the natural relationship entirely and for all purposes, so that in case the child survived the natural parents, none of their estate would go to such child, and so that upon the death of the adopted child an estate not derived from the adopted parents would vest, not, according to our law of descents, in her relations by blood, but would go only to such relations as the adoption created?

"Under the Roman law," it is said in *Vidal v. Com-magere*, 13 La. Ann. 517, "the person adopted entered into the family and came under the power of the person adopting him, and the effect was such that the person adopted stood not only himself in the relation of child to him adopting, but his children became grand-children of such. Dig. Lib. 1, p. 7, 1, 23, 27. Hence, when Tiberius was adopted by Augustus, by arrogation, Germanicus became the grand-son of Augustus. The French law also admitted of adoption, and the adopted succeeded to the inheritance of the adoptor. Code Napoleon, art. 350. It was also known to the Spanish law, and the person adopted succeeded as heir to him who adopted him. See Title 16, 4th Partidas." It was held in that case that an act of the Legislature authorizing the adoption of an orphan child, conferred on the child all the rights of a legitimate child, and among them the right of inheriting the estate of those making the adoption. But this throws no light upon the question now to be determined. Our statute confers the same right.

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A very cursory examination of the civil law, to which our attention has been called as tending to explain the purpose of our legislation on the subject, will show that our statute is not derived from any such source, unless the use of the term "adoption" should be regarded as so indicating. The subject of adoption and "arrogation" (another form of the same ceremony) forms an extensive branch of the Roman law, containing nice distinctions and minute regulations affecting the adoptor, the adopted and the natural parents. It originated under a form of government and state of society totally different from ours, and has undergone various mutations, not only in the country of its origin, but in the modern governments which succeeded the Roman Empire, and based their codes, to a great extent, upon the ancient system as modified by Justinian. Previous to the time of Justinian, the effect of adoption was to place the person adopted precisely in the position he would have held had he been born a son of the person adopting him, and this is the effect now proposed to be given to our statute. But it will be observed that when this was the law, the ceremony of adoption was a very solemn one, and all parties, the adoptor, the adopted and the natural parents, were required to be present. As observed by Mr. Sanders, (Institutes of Justinian, p. 122,) "a public character was always attached in ancient Roman law to so important an alteration in families as adoption. The sanction of the *curiae* was necessary to its validity. If the person adopted was *sui juris* his entry into a new family (*arrogatio*) was jealously watched, as the *pontifices* would never allow it where there was any likelihood of the sacred rites of the family he quitted being extinguished by his departure from it. The form of gaining the consent of the *curiae* was even continued when the *curiae* were only represented by thirty lictors, until the rescript of the Emperor was substituted as a means of regulating arrogations. \* \* If the person adopted was under the power of another, the person under whose power he was,

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had to release him from that power, which he did by selling him (*mancipatio*) three several times, which destroyed his own *patriae potestas*, and then giving him up to the adopted parent by a fictitious process of law, called *in jure cessio*, in which he was claimed and acknowledged as the child of the person who adopted him, and pronounced to be so by the magistrate before whom the proceeding was had (*imperio magistratus*). \* \* The word *adoptio* was common to both processes, both to *arrogatio*, said by Gaius to be derived from *rogo* because the person arrogated was asked before the *curia* whether he consented, and to *adoptio* in its more limited sense of the adoption of a person not *sui juris*. For the ceremonies previously required for the adoption of a person *alieni juris* Justinian substituted the simple proceeding of executing, in presence of a magistrate, a deed declaring the fact of the adoption, all parties to the adoption, that is, the person giving, the person given and the person receiving, being personally present to give their consent."

But the law of Justinian changed this. Copying from Mr. Sanders' translation, it reads thus: "But now by our constitution when a *filius familias* is given in adoption by his natural father to a stranger, the power of a natural father is not dissolved; no right passes to the adoptive father, nor is the adopted son in his power, although we allow such son the right of succession to his adoptive father dying intestate. But if a natural father should give his son in adoption not to a stranger, but to the son's maternal grand-father, or, supposing the natural father has been emancipated, if he gives the son in adoption to the son's paternal grand-father, or to the son's paternal or maternal great-grand-father, in this case, as the rights of nature and adoption concur in the same person, the power of the adoptive father, knit by natural ties and strengthened by the bond of adoption, is preserved undiminished, so that the adopted son is not only in the family but in the power of his adoptive father." So that the law

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of Justinian completely altered the old law of adoption. Under the old law a son lost the succession to his own father by being adopted, and therefore Justinian provided that the son given in adoption to a stranger should be in the same position to his own father as before, and merely gain by adoption the succession to his adopted father in case he died intestate. This kind of adoption was called *adoptio minus plena*, and when the adoptive son was given to a person who was one of his own ascendants, it was called *adoptio plena*.

Without going into further details it will be obvious that our statute, so far from following the Roman law, either before or after the time of Justinian, is distinguishable from it in many important particulars. Our law makes no provision whatever for the assent or concurrence of the natural parents of the party proposed to be adopted, much less for any of those solemn examinations of all parties before a tribunal either judicial, political or religious, such as were required by the Roman law. It makes no distinction between strangers and blood relatives, as to the inheritable capacity of the adopted person, either in acquiring or transmitting property and it makes no provision to prevent the adoptive father or mother from devising the whole estate from the adopted child.

If we look into the Code Napoleon, which contains an article on this subject consisting of several sections (see Code, Title 8) the same important and essential difference may be found. The adoption is prohibited before majority of the adopted party (§ 346), and the adopted retains all his rights in his own family (§ 348) and if the adopted child die without lawful descendants "presents made by the adoptor or acquisitions by inheritance to him, and which shall actually exist at the decease of the adopted, shall return to the adoptor, or to his descendants, on condition of contributing to debts without prejudice to third persons. The surplus of the property of the adopted shall belong to his own relations, &c." Our statute, so far as it

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provides for the status of the child adopted, is contained in a single section which simply declares the rights of the adopted to support and maintenance, and the same rights and privileges as a natural child has against the person executing the deed of adoption, which would of course include the right to inherit from the adoptive father or mother. The statute is silent as to whether the child loses the right to inherit from the natural parents and as to the capacity of transmitting property acquired either from the adoptive parent or from any other quarter. The civil law, as we have seen, provides that where the adopted child is a stranger to the blood of the adoptor, the right of inheritance from the natural parents, is not lost; and the Code Napoleon provides that where the property of the adopted child comes from the adoptive parent, on the death of such child it reverts to the adoptive parent, saving the rights of creditors, and where it does not come from such a source it goes to the natural parents or other blood relatives according to the law of descents. (Such a provision commends itself to our sense of justice, but it is not in our statute. What changes, if any, were intended to be made in our statute of descents in connection with this law of adoption is a mere matter of conjecture, and we have no authority to depart from the rules of descent established in the general statute on that subject.

An objection has been made to this proceeding for partition which ought properly to have been noticed in advance.

3. HEIRS.

As the petitioner is himself the owner of the life estate in the whole tract proposed to be divided, and also owns the interest of a part of the remainder mentioned, no objection can of course be made to the partition on account of the entire property being subject to a life estate. The objection is, that as Mrs. Koppelman is still living, her heirs are not ascertainable, and not in existence, and their interests, should she yet have children, would be destroyed. The answer to this objection by the petitioner is that the word "heirs" used in the will was meant heir ap-



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parent or the heirs of Mrs. Koppelman in existence at the death of the testator; and there is no doubt that there are a number of cases in England as well as this country that allow this word to be so construed in wills, where the intent of the testator is manifest, that he refers to such heir or heirs but in this case the remainder is given on the death of Mrs. Koppelman, and where he uses the term "her heirs," as entitled to a remainder, there is nothing in the will to lead to the inference that he meant by the word heirs to restrict them to such heirs as existed on his death, or were in existence at the time he wrote his will, but on the contrary he referred to heirs when she died. In *Goodright on dem. of Brooking v. White*, 2 Black. 1011, the devise was to the heir of his daughter Margaret, then living, and this was held as a sufficient *descriptio personae* to entitle the heir apparent on the demise of the testator to take. And in *Carne v. Roch*, 7 Bingh. 226, a devise was made to the heirs of Mrs. Roch of Butterhill, who was living at the death of the testator, and it was determined by all the judges that the eldest son of Mrs. Roch took the estate devised, although Mrs. Roch was living at the time of the trial. But the remainders in this case are given on the determination of the life estate of Mrs. Koppelman, and therefore, when her heirs are mentioned in the will, there is no reason to depart from the usual acceptation of the word "heirs."

But the question remains, will this remainder defeat the partition because it is unknown who will be the heirs of Mrs. Koppelman until her death. We think not. Apart from any statute, the English courts had no hesitation in decreeing partitions in such cases. In *Wills v. Slade*, 6 Ves. Ch. 498, it was held by Lord Eldon that "it was no objection to a partition that other persons may come *in esse* and be entitled; for if so, in every case where there is a settled estate with remainder to persons who may come *in esse*, there never can be a partition." In *Gaskell v. Gaskell*, 6 Sim. Ch. 643, it was held

4. PARTITION: CONTINGENT ESTATES.



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that a tenant for life of an undivided share of an estate, with remainder to his unborn sons in tail, may file a bill for partition, and the decree would be binding on the sons when *in esse*. In *Mead v. Mitchell*, 17 N. Y. 210, the court of appeals of New York, composed of eight judges, recognized with unanimity the same doctrine under the statute of that State which is substantially identical with ours. The parties not *in esse* are represented by those who take subject to their rights, but the partition or sale is conclusive so far as third persons or purchasers are concerned. Our statute declares that the sheriff's deed shall be a bar against all persons interested in the premises, who shall have been parties, and against all others claiming from such parties. Wag. Stat., § 34, p. 971. Of course parties not *in esse* cannot be made parties to the suit for partition, except by naming the owner of the particular estate to which, on certain contingencies, they become entitled, and this is recognized by our statute which declares that if the interest of any one "be unknown to petitioner or be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be contingent, so that such parties cannot be named, the same shall be so stated in the petition." The requisition of such statement implies that the facts so stated shall constitute no bar to a partition.

It is insisted, however, that our statute is unconstitutional, for the reason that it conflicts with the provision which declares "that no person shall be deprived of life, liberty or property without due process of law." This provision of our constitution, doubtless, may be found in that of New York where the case of *Mead v. Mitchell* was decided, and in that of most of the other States, and is certainly in the constitution of the United States, and is in all a translation from *Magna Charta*, which we may assume was binding on the English judges. The due process of law required is not dispensed with in our statute.

6. PARTITION SALE  
CONCLUSIVE  
AGAINST PERSONS  
NOT IN ESSE; CON-  
stitutionality of  
statute.

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The judgment of the general term of the St. Louis circuit court is affirmed. The other judges concur.

AFFIRMED.

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GANTT V. THE AMERICAN CENTRAL INSURANCE COMPANY,  
*Appellant.*

1. **Re-insurance: RIGHTS AND DUTIES OF THE PARTIES TO THE CONTRACT: JUDGMENT: NOTICE.** An insurer whose risk is re-insured, is not obliged, in order to maintain his action against his re-insurer, to show that he has paid the loss. He may at once resort to his action against the re-insurer, and to such action the re-insurer may make the same defense that the re-assured could make against the original assured, or the re-assured may await a suit by the first assured, and when it is brought give notice of it to his re-insurer. If the re-insurer desires the claim contested, he may take part in the defense. If he neither participates in the defense, nor gives notice that he does not object to the claim, he will be taken to have required the re-assured to defend for him, and the latter becomes, by operation of law, *sub modo*, his agent for that purpose. If the re-assured then defends in good faith, the judgment will be binding upon the re-insurer as to all matters which could have been litigated therein, and will make him liable for the costs and expenses of the litigation; but no judgment collusively obtained will support a recovery against the reinsurer.
2. — : **AGREEMENT FOR RESISTANCE CONSTRUED.** An insurance company having re-insured in other companies part of a risk on a boat load of cotton, and being about to be sued by the insured for a loss, entered into an arrangement with the re-insuring companies, by which it was agreed that the first insurer should employ such counsel as it saw proper, to defend the suit, and in the event the defense should be successful the re-insurers should pay their *pro rata* proportion of the attorneys' fees and costs, and in the event it should fail, they should pay their *pro rata* proportion of the judgment, attorneys' fees and costs. *Held*, that this agreement did not alter the relations of the parties to the contracts of re-insurance; that the re-assured undertook no new duty, and the re-insurers incurred no new obligation except the liability to pay a share of the expenses in the event of a successful defense; and this was merely supplemental in its nature and did not affect the policies; that the

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agreement, at most, made the re-assured the agent of the re-insurers for the purpose of making the defense, and not a trustee for them; that it did not irrevocably commit the defense to the re-assured, but the re-insurers had the right at any time to come in and defend on their own behalf; that the attorneys employed by the re-assured represented the re-insurers in the conduct of the suit; and that there was nothing in the agreement which required the re-assured company to retain a pecuniary interest in the litigation, or forbade it from making a compromise of its liability.

3. — : COMPROMISE AGREEMENT CONSTRUED. An insurance company having entered into an agreement such as the foregoing with several re-insuring companies, afterwards, pending the litigation, without their consent, compromised with the assured by paying a certain sum in cash and agreeing, in the event a judgment should be rendered in favor of the assured in the pending suit, to assign the policies of re-insurance to them. The assured, on their part, agreed to enter satisfaction of any such judgment on receiving such assignments. The contract further reserved to the re-assured company the right to continue the defense of the suit, and provided that the assured should retain the money paid even though they failed in their suit. The assured subsequently recovered judgment, and the policies of re-insurance were then assigned to them, as had been agreed, and the judgment was entered satisfied. The re-insuring companies had knowledge of this contract for about a month before the trial took place, but took no step to interpose any defense for themselves, or to prevent the re-assured company from making the defense. In a suit upon one of the assigned policies brought by the trustees of the original assured; *Held*, that this contract created no conflict between the duty and the interest of the re-assured company; that all the re-insuring companies could demand was an honest defense of the suit, and the contract did not disable the re-assured from making this; that the fact that it no longer had any substantial interest in the controversy did not disqualify it from continuing the defense; that the re-insuring companies having failed to interpose must be considered as having acquiesced in its right to do so, and in the absence of evidence of want of good faith on the part of the re-assured company in making the defense, the re-insurers must be bound by the judgment.
4. — : MEASURE OF DAMAGES. In an action on a policy of re-insurance the true measure of damages is not what the re-assured has paid the original assured, but what he is bound, under his policy, to pay by reason of the loss.

*Appeal from St. Louis Court of Appeals.*

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This was a suit on a contract of re-insurance against loss by fire, brought by the plaintiffs, Gantt and Strong, as trustees for Hening & Pearce, surviving partners of the firm of Hening & Woodruff.

The facts are as follows: On the 9th day of June, 1864, Hening & Woodruff sustained a loss by fire of 700 bales of cotton, valued at \$280,000, on the steamer Progress, on a voyage between the mouth of Red river and the mouth of the Ohio. They claimed to be insured with the United States Insurance Company, under an open policy and a supplementary verbal contract of insurance to the extent of \$120,000. Several other companies, including the present defendant, had re-insured five-sixths of the risks of the United States Insurance Company, and the latter company claimed that the defendant, the American Central Insurance Company, had re-insured so much of any risk it might have on cotton as exceeded \$100,000 and did not exceed \$120,000, in other words, the sixth \$20,000, of any risk it might have, and it claimed that if it was bound to Hening & Woodruff for \$120,000, it had its recourse against the defendant for \$20,000, and against each of the other four companies for a like amount. Under these circumstances, notice having been given of the loss, the United States convened the other five companies for the purpose of consultation. The result was that they all joined in a resolution to resist the claim. A contract embodying this resolution was signed on the 18th day of July, 1864. It was in the following terms:

"Whereas, a claim is made upon the United States Insurance Company, under open policy and agreement of Hening & Woodruff with said insurance company, for the sum of \$120,000, for cotton burned on the steamer Progress, on the Mississippi river, on or about the 9th day of June, 1864; and whereas, each of the undersigned insurance companies is bound and liable to the said United States Insurance Company to the amount of \$20,000 on any loss on cotton for which it is liable, as re-insured to it, to that

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amount each; and whereas, it is believed both by said United States Insurance Company and the undersigned companies, that said claim is illegal and unjust, and the undersigned desire that the same shall be resisted and defended; now, therefore, for that purpose, in consideration of the premises, we agree with the said United States Insurance Company, that it shall employ and retain such counsel as it may deem proper to consult, and to manage said defense, and that in case said United States Insurance Company shall be successful, and shall not be liable upon or for said claim, then we will each pay our *pro rata* proportion of said attorneys' fees and costs, if any, and in case said United States Insurance Company shall fail in its defense and shall be made liable by the judgment of the court upon or for said claim, then we will each pay our equal *pro rata* proportion of such claim and judgment, and of the attorneys' fees and costs."

In pursuance of this agreement the United States Insurance Company employed counsel who defended the suits that were subsequently brought, and whose fees were paid from time to time by that company, the re-insuring companies reimbursing the latter their *pro rata* proportions. The United States company had entire control of the suits, the counsel consulting with them alone as to the conduct of them. Suit was at first brought in the State court, and after long litigation, culminated in a decision by the Supreme Court affirming a judgment of non-suit against the plaintiffs, and holding that the United States Insurance Company was not liable because the contract of insurance was not in writing. 47. Mo. 525. The plaintiffs, being citizens of New York, in 1871, renewed their suit in the United States Court. At the spring term, 1872, that court, overruling a demurrer to the petition, held that the verbal contract of insurance declared on was valid. 2 Dillon C. C., 27. An answer was then filed and the cause was continued to the fall term for trial.

In the meantime efforts were being made to effect a

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compromise. The American Central company always opposed that course, insisting on fighting it out to the bitter end. On the 24th day of July, 1872, the following agreement was made between the United States company and Hening & Pearce:

"Whereas, Robert M. Hening and Albert Pearce, as surviving partners of Hening & Woodruff, claim that the United States Insurance Company, of St. Louis, Missouri, was liable to said Hening & Woodruff, and is liable to said survivors for and on account of cotton on the steamer Progress and some barges, in the year 1864, and have sued said insurance company in the circuit court of the United States \* \* and said claim is denied and resisted, and a settlement of the judgment which may be rendered in said suit upon said claim, and also of any suit, judgment, claim or demand against the said United States Insurance Company on account of said cotton, is hereby made and agreed upon as between said insurance company and said Hening & Pearce, and, therefore, said company this day pays to said Hening & Pearce \$22,000, and assigns to them its claim to the proceeds of cotton damaged on the steamer Des Arc, in 1864, which proceeds were in the hands of one D. H. Page, in his life-time, in New York. Now, therefore, in consideration of the premises, the said Hening & Pearce, surviving partners of Hening & Woodruff, agree and bind themselves to release said United States Insurance Company from any judgment which may be recovered in said suit, or in any suit or procedure which may ever be had or made on said claim, or any part thereof against it. But if any judgment shall be finally recovered in said suit, or in any suit or proceeding for or upon said claim against said company, then said company is to assign and transfer to said Hening & Pearce, or the survivors of them or their assigns or representatives all the claim and demand which it may have on the Phoenix Insurance Company, of St. Louis, the American Central Insurance Company, of St. Louis, the Globe Mutual Insurance Company,



of St. Louis, and the Security Insurance Company, of New York, in respect of the re-insurance claimed to have been effected by the United States Insurance Company with said companies respectively, on account of the risks taken by the United States Insurance Company on cotton for Hening & Woodruff, which assignments are to be received by Hening & Pearce, their assigns or representatives, in full of any judgment or claim against said United States Insurance Company, and in satisfaction thereof, and said Hening & Pearce shall only pursue any remedy they may elect and as they choose under such assignments, which assignments are to be without liability or recourse on said insurance company, provided, however, that in any action or proceedings under such assignments, said Hening & Pearce may use the name of said United States Insurance Company at their own cost, and protecting the company therefrom, if they elect to do so. But it is agreed and understood that nothing herein is to hinder or prevent the United States Insurance Company from defending or continuing fully and in all things to defend said suit, or any suit or proceeding for or on account of said claim. It is further understood that in case said suit is defeated and no recovery is had therein, yet said Hening & Pearce are to keep said \$22,000, and said claims for moneys which were in the hands of Page, and not to refund or re-pay the same."

The present defendant was no party to this agreement and was not informed of its existence, until a week or more after it was made. Mr. Branch, the assistant secretary of defendant, hearing a rumor, that the United States company had settled, called at the office of the latter company and asked to be allowed to see the contract if it was in writing. Mr. Bodley, the secretary of the United States, replied that it was in writing, but declined to allow Mr. Branch to see it, unless he was specially deputed by his company for that purpose. On the following day, Mr. Branch returned with special authority from his company,

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and was then permitted to see and examine the contract, but his request to be allowed to take a copy was refused. At these interviews Mr. Branch denounced the action of the United States company as a fraud upon the defendant. On consultation with its attorneys the defendant resolved to hold no further communication with the United States company, and none was held.

The suit of Hening & Pearce came on for trial in the following September, and on the 24th day of that month, resulted in a verdict and judgment for the plaintiffs in the sum of \$178,280. The present defendant took no part in the defense of that suit, did not ask to take any part, nor ask for any change of attorneys, and did not, after February, 1872, contribute anything further towards payment of attorneys' fees; nor did it ask to be allowed to take an appeal. No appeal was, in point of fact, taken, and shortly after the judgment was rendered, in accordance with the compromise agreement, the United States company assigned to Gantt & Strong, the present plaintiffs, its claim on the supposed contract of re-insurance against the present defendants. The \$22,000 named in the agreement, and the money in the hands of Page amounting to about \$5,000, was paid at the time the agreement was made, together with the further sum of \$7,000 which was furnished by the Marine, one of the re-insuring companies, in settlement of its liability. Gantt & Strong had been the attorneys of the claimants throughout the litigation, and received the assignment in trust for their benefit. The United States court was not advised of the compromise agreement at the time of the trial.

This suit was brought under the foregoing assignment. At the trial the foregoing facts were developed. The plaintiffs offered to prove in addition that the suit in the Federal court was defended as vigorously after the compromise as before, that the plan of defense was arranged long before and was faithfully carried out, and that no efforts to defeat the action were omitted. This evidence

was objected to by the defendant and was excluded by the court.

At the instance of the plaintiffs, the following instructions were given :

1. The judgment rendered in the circuit court of the United States in favor of Hening & Pearce, and against the United States Insurance Company, is conclusive as to the liability of the defendant in this case upon its policy of re-insurance, unless such judgment was obtained by fraud, or by collusion between said Hening & Pearce and said United States Insurance Company.

2. Fraud or collusion, cannot be presumed, but must be proved by evidence satisfactory to the jury, and the burden of proving fraud and collusion in the defense of the suit in the United States circuit court devolves on the defendant, but such fraud or collusion need not be proven by direct testimony, but may be inferred by the jury from all the facts and circumstances in the case as established in evidence.

3. If the jury find for plaintiffs, they will assess the damages at one-sixth of one hundred and seventy-eight thousand two hundred and eighty (178,280) dollars, and interest thereon at six per cent.

4. If defendant had notice of the agreement of July 24th, 1872, within ten or fifteen days after it was made, and with such knowledge acquiesced in the provision therein contained for defending the suit in the United States circuit court, or stood by and permitted said United States Insurance Company, or the attorneys employed by it, to go on and try said cause, and made no effort to secure any other attorneys, or to take control of said defense, then said agreement constitutes no defense to this action.

The following instructions were refused on the part of the defendant :

3. Under the agreement of July, 1864, and by its terms, the attorneys employed by the United States Insurance Company were not the attorneys of the defendant in

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this case, nor is the defendant bound by the acts of the attorneys of that company.

4. The agreement of July 24th, 1872, is a fraud on defendant, unless defendant assented to it.

5. If the jury believe from the evidence that the agreement of date July 18th, 1864, was executed by the defendant with other companies, that afterwards, and under this agreement, defendant paid money, when called upon so to do by the United States Insurance Company, to said company, in order that it might defend the suit or suits brought by Hening & Woodruff against said United States company, and otherwise protect defendant's interest; and that under said agreement said United States Insurance Company went on for a time in good faith resisting said claim of Hening & Woodruff, and that afterwards, and on or about July 24th, 1872, the compromise agreement of that date was made between Hening & Woodruff, or its successors, and the United States Insurance Company, then the jury is instructed that said compromise agreement so made inured to defendant's benefit, and defendant has a right to claim the benefit of it; and if the jury further believe that under its provisions the United States Insurance Company was discharged from liability on its paying the sum of \$27,000 and making the assignments in said agreement named, then the plaintiffs cannot recover in this case.

6. If the jury believe from the evidence that after the making and delivery of the agreement of July 24th, 1872, and the payment of the money named in that agreement by the United States Insurance Company to Hening & Pearce, or their agents or attorneys, the trial of the suit in the United States court came on, and the said United States Insurance Company, and its attorneys, failed to produce or bring to the knowledge of said court the said agreement of compromise, and the payment of the money under and according to it, then the said United States Insurance Company violated its agreement with defendant,

being the contract sued on, and the plaintiffs cannot recover in this case.

7. The burden is on the plaintiffs in this case to show that the United States Insurance Company performed the contract of July 18th, 1864, fully and in good faith, and the jury is instructed that there could be no performance in good faith consistently with the agreement of July 24th, 1872, unless the defendant in this case knew of said contract at the time it was made, or afterwards, and agreed to be bound by its terms.

8. If the jury believe from the evidence that the defendant did not assent or agree to the compromise of July 24th, 1872, made by and between the United States Insurance Company and Hening & Woodruff, or their successors, either before or after said compromise agreement was made between the parties thereto, then the jury will find for the defendant. If at any time the defendant did, after it had become acquainted with the terms of said agreement, assent thereto, then said agreement of compromise inured to the benefit of the defendant, and the plaintiffs are not entitled to recover in this case.

10. The jury are instructed that if, under the other instructions given in this case, they find the defendant liable, its liability is only for the sixth twenty thousand dollars. In other words, this defendant is not liable till the United States Insurance Company has suffered a loss of over \$100,000. If the United States Insurance Company secured a discharge or release from its liability by paying \$27,000, or any other sum or property, not amounting to \$100,000, then the jury will find for the defendant.

11. The jury are instructed that even if under the other instructions given in the case they find the defendant liable, its liability cannot in any event exceed one-sixth part of the amount paid by the United States Insurance Company, under the compromise of July 24th, 1872, that is, one-sixth part of \$27,000, with interest.

12. If the defendant did not assent or agree to the

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compromise of July 24th, 1872, the jury will find for the defendant. And the burden of proof is on the plaintiffs to satisfy the jury that the defendant did assent or agree to said compromise.

[This instruction, No. 12, the court refused to give; and inserted the words "or ratify" after the words "or agree to," and gave the instruction as altered.]

13. By consent to the agreement of July 24th, 1872, is meant that assent and approbation of the defendant which is announced expressly or impliedly to the United States Insurance Company, after a full knowledge of its provisions. And if the jury find from the evidence that when said agreement became known to the American Central Insurance Company it objected and denounced the same as a fraud upon its rights,—then said American Central Insurance Company cannot be presumed to be assenting to said agreement or compromise by the fact that it had knowledge that the suit pending in the United States court was thereafter prosecuted to a judgment.

[This last instruction the court refused to give; but added the words "and never afterwards consented to it," after the words "as a fraud upon its rights," and gave the instruction with this interpolation.]

The following instructions were given for defendant:

4. If the judgment in the case of *Hening et al. v. The United States Insurance Company*, in the United States Court, was obtained in pursuance of the terms of the agreement of July 24th, 1872, then said judgment was fraudulently obtained, and is not binding on this defendant, unless the defendant, after it learned of said compromise agreement and its provisions, ratified or consented to it.

7. The agreement of July 24th, 1872, was a fraud on the defendant, and the jury will find for the defendant, unless they believe from the evidence that the defendant knew of said agreement and the provisions thereof, and



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with such knowledge ratified the same or consented to the same.

9. The jury is instructed that the fact that money was paid by the defendant to the United States Insurance Company, and by that company paid to its attorneys for legal services in the proceedings in the United States Court, did not render the attorneys of the United States Insurance Company the agents or the attorneys of the defendant, and no acts or omissions of said attorneys would or did in any way bind this defendant, the American Central Insurance Company.

The jury found for plaintiffs, and assessed the damages at \$36,101.69. Judgment was entered on the verdict, and defendant appealed. The court of appeals affirmed this judgment, and defendant then appealed to this court.

*John H. Rankin* for appellant.

The plaintiffs relied on the agreement of July 18th, 1864, to establish the liability of defendant as a re-insurer. The foundation of that agreement was the trust and confidence reposed in the United States Insurance Company by the defendant. That company, for a period of eight years, went on and acted, and again and again received defendant's money under this trust, which it had assumed at its own suggestion and by its own desire. During all this time it had the sole management of the litigation, the defendant and the other re-insuring companies, relying upon it entirely. Suddenly, on the 24th day of July, 1872, without a word to defendant, the fraudulent compromise was made between the defendant's trustee and the common enemy, whom the United States Insurance Company had all along been fighting in good faith under the Sharp-agreement. The defendant had distinctly and positively refused to make any compromise, or to pay one dollar: had told its trustee, the United States Insurance Company, that it would not compromise or pay; and in

the teeth of this, the trustee made the compromise, which it perfected by payments of money. Now what was the legal effect of this? It was,

1. That the United States Insurance Company did not perform the agreement of July, 1864; nay, more, they violated it in the worst way they could, by an act which was a fraud upon defendant's rights. If this be so, how can the plaintiffs recover, when, as above stated, he is forced to and does make that agreement the foundation of his case? We have the singular spectacle of plaintiffs producing, at one part of their case, a contract with the defendant as the only means by which they can get to the jury, and at another part of their case showing that they themselves (for they are in the assignors' shoes) violated that contract by a fraud of the grossest character.

2. But there was another legal effect flowing from the above facts—that is, that as soon as the compromise agreement was made, it being made in reference to the subject matter of the trust, it inured to the benefit of the re-insuring companies, if they chose afterward to adopt it. This is a purely legal effect, existing or not at the option of the principal. If the *cestui que trust* or principal, wishes at any time to claim the benefit of the trustee's contract, made on the subject matter of the trust, he can do so, the principle of law being that the trustee or agent shall not be allowed to operate for himself, but only for his principal. Nor does this right of the *cestui que trust* depend on there being any fraud in the contract or arrangement. It is entirely immaterial whether there is fraud; but the existence of fraud makes a stronger case for the application of the rule. *Rea v. Copelin*, 47 Mo. 83; *Holridge v. Gillespie*, 2 John. Ch. 30; *Keech v. Sandford*, 1 Lead. Cases Eq. 36; Wharton on Agency, § 240; *VonHurter v. Spengeman*, 2 Green (N. J.) 185; Kerr on Fraud, p. 150; *Motley v. Motley*, 7 Iredell 211; *Yates v. Arden*, 5 Cr. C. C. 526; *Jamison v. Glascock*, 29 Mo. 195. The following authorities also show that the obligation is imperative on the person

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in whom the confidence is reposed, to disclose, throughout, to the principal "every fact, circumstance and advantage" in relation to the matter which may come to the knowledge of the agent, so that the person who reposes the confidence can act at the proper time and with full knowledge of all possible advantages. *McDonald v. Fithian*, 6 Ill. 269; *Meeker v. York*, 13 La. Ann. 18; *Bruce v. Davenport*, 36 Barb. 349; *Exchange Bank v. Yorke*, 4 La. Ann. 138; *Knabe v. Ternot*, 16 La. Ann. 13; *Roorback v. St. B. Co.*, 6 John. Ch. 469; *Blount v. Robeson*, 3 Jones Eq. (N. C.) 73; *Reeside v. Reeside*, 6 Phila. 507; *Wellford v. Chancellor*, 5 Grattan 39; *Reed v. Warner*, 5 Paige, 650; *Reimers v. Ridner*, 2 Robt. (N. Y.) 7. The action of the agent is void, as being against the policy of the law, which will not permit an agent to deal for himself on the subject matter intrusted to him, unless the principal chooses to adopt the acts of the agent. If he chooses to adopt them, they inure, with all their advantages, to the principal's benefit. If the principal does not adopt them they are void. *McKinley v. Irvine*, 13 Alab. 681; *Walker v. Palmer*, 24 Alab. 358; *Banks v. Judah*, 8 Conn. 145; *Matthews v. Light*, 32 Me. 305; *Copeland v. Merc. Ins. Co.*, 6 Pick. 198; *Moore v. Moore*, 5 N. Y. 256; *Segar v. Edwards*, 11 Leigh (Va.) 213; *Galbraith v. Elder*, 8 Watts 81; *Sweet v. Jacocks*, 6 Paige 355; *Ringo v. Binns*, 10 Pet. 270; *Rankin v. Porter*, 7 Watts 387; *Church v. Sterling*, 16 Conn. 389; *Cleavinger v. Reimar*, 3 W. & Serg. 487. From the above authorities it follows that if there was any acquiescence in or ratification of the agreement of July 24th, 1872, the benefits of that agreement inured to the defendant.

3. But on an entirely distinct ground from the above the effect of the agreement made between the United States Insurance Company and Henning & Pearce, was to release the defendant. The defendant stands in the relation (as our Supreme Court says in the *Phoenix* case cited below) of a party answerable over, a guarantor, a surety. Now it is well settled that whenever by an agreement with

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the creditor the terms of the obligation are changed or varied, the surety, or party liable over, is thereby discharged. A binding agreement to merely give time, will discharge the surety, as in the familiar case where the holder of a note gives time to the maker and thus discharges the indorser. *King v. Baldwin*, 2 John. Ch. 554; s. c., 17 John. 384. Nor does it matter whether the change in the terms of the obligation is detrimental to the surety. *U. S. v. Simpson*, 2 Pa. 437. Yet every change causing detriment releases the party liable over. The principle is one of general application and will hold good in every instance in which the surety is placed in a worse position by the wrongful act of the creditor. *Miller v. Stewart*, 9 Wheat. 680; *Torry v. Bank*, 9 Paige. 649; *Birckhead v. Brown*, 5 Hill 640; 2 Am. Lead. Cas. 348; *Polak v. Eckerett*, 3 Cent. Law Jour. 307.

According to the repeated decisions of our Supreme Court and to all the above authorities, if the defendant acquiesced in or ratified the agreement of July 24th, 1872, the legal effect of such ratification was to make the benefit of that agreement inure to the defendant. By that compromise the United States Insurance Company got a full discharge from liability by paying \$27,000. By that agreement it was forever saved harmless from any loss or payment by reason of any judgment. The very agreement recites that a settlement of any judgment which may be rendered in said suit, or any suit, is "hereby made and agreed on." Then Henning & Pearce agree and bind themselves to release said company from any judgment which may be recovered in said suit. Now, as under the above authorities, all the benefits of the agreement accrue directly to the principal, just as if its name were inserted in the agreement in place of the name of the agent, this defendant cannot be liable at all if there was any consent, acquiescence or ratification. If, indeed, the defendant were strictly liable for a *pro rata* share of the amount to be paid by the United States Insurance Company, the

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defendant might be liable for one-sixth part of \$27,000; but the only claim is that it is liable for the sixth \$20,000; and as by the compromise its liability was never reached, it is bound to pay nothing.

4. The above arguments are entirely irrespective of the question of fraud; and show that if the compromise agreement was assented to or acquiesced in, the plaintiffs have no case. But, in truth, the compromise agreement was on its face fraudulent in law, and nothing but an express assent, with full knowledge of all its terms and their effect, could bind defendant to it, under any circumstances. It is not pretended that there was any assent or even knowledge of the agreement of July 24th, 1872, on the part of the defendant till after it was made and delivered. Our propositions under this head are—*a.* The agreement of July 24th, 1872, was on its face fraudulent; and because of the fraud, the effect of making and carrying it out by the United States Insurance Company was to release defendant. *b.* This agreement provides, by necessary implication, that it (the agreement) shall be kept from the knowledge of the United States Court; accordingly the judgment was in law, fraudulent and void by virtue of the agreement. *c.* The doctrine of ratification or subsequent acquiescence has nothing to do with this case; and if there could be any ratification, it could be only by express assent, and not by mere inaction or failure to dissent.

The agreement of 1872 contemplated and provided for a fraud on a court of justice, and this was an essential point of said agreement and necessary to carry it out. The agreement was not fully executed till this fraud was perpetrated on the court; but when executed, the judgment was fraudulent and void. As this fraud appeared in the case and by plaintiffs' own witness, who testified that the plot was carried out by concealing the agreement from the court, and that the court was allowed to try a feigned and sham issue, as if it had been a real one, the judgment should have been excluded from the jury. *People v. Le-*



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land, 40 Ill. 118; *Gardner v. Goodyear D. V. Co.*, 6 Fisher's Pat. Cas. 329; *Kohn v. La. Ins. Co.*, 15 La. 86.

*Martin & Lackland* for appellant.

The contract of July, 1864, contained, among others, a covenant on the part of the re-insurers to pay their *pro rata* proportion of any judgment, provided the United States Insurance Company should fail in its defense and be made liable by such judgment upon the claim. As a consequence of this provision, the re-insurers surrendered and released to the United States Insurance Company the important right belonging to them as re-insurers, to contest any suit or claim against them as re-insurers by that company. Certainly no one will contend that after the execution of this contract the United States Insurance Company could have turned round the next day, and brought suit against them. Upon the execution of this agreement the United States Insurance Company for the first time assumed a relation of trust towards the re-insurers. The trust consists in this, that the United States Insurance Company could be sued by Hening & Woodruff; and that company had to defend that suit in its own name irrespective of any contract of assistance; and in consideration that it would defend the suit of Hening & Woodruff for the \$120,000, the re-insurers surrendered to the United States Insurance Company the right to defend in the usual way any suit against them for \$100,000; thereby accepting as a full substitute for their rights of defense as re-insurers, the contemplated defense of the United States Insurance Company in the suit of Hening & Woodruff. It is important to bear in mind this distinction, viz: that the re-insurers did not appoint the United States Insurance Company as their agent to manage and control their defense on their policies, but that they surrendered and agreed to forego such defense in consideration that the United States Insurance Company undertook and agreed



to defend and resist in its own name the suit or suits for \$120,000 against itself. It undertook, in consideration of the surrender as stated, to defend its own liability. This was to be done for the benefit of the re-insurers as well as itself.

Now, this is an active trust, and so appears in the contract. The United States Insurance Company was to employ counsel, and the defense was to be conducted and managed by it alone. The trust was also irrevocable, and after it was created the re-insuring companies had no right to interfere in the conduct of and management of the case in any manner whatever. That part of the trust was given to the United States Insurance Company, and the re-insurers had nothing to do but to pay expenses when called on, and pay their *pro rata* share of the insurance whenever the United States Insurance Company failed in its defense and became liable by a judgment. The eventual liability of the re-insurers for \$100,000 depended upon the faithful discharge, by the United States Insurance Company, of the trust assumed by it in relation to the Hening & Woodruff claim.

The object and purpose of the creation of the trust was to resist and defend the suit, not to settle or compromise it. It is not a case of agency. The defendant did not appoint the United States company its agent. The contract was that that company should defend in good faith the claim against itself, in its own name, and by its own attorneys. It is also no agency, because, after the contract was signed the defendant could not discharge either the United States company or the attorneys employed by it. Neither could it abrogate or revoke the privileges and duty contained in the contract. It was irrevocable in like manner as every trust for the advantage of the beneficiary.

2. A privity grew up between the re-insurers and the United States Insurance Company in relation to the suit of Hening & Woodruff, as proceeding from this contract

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of trust. It cannot be treated as a simple notice to defendant. Manifestly, after a notice is given, the re-insurer can come forward and regulate, by special arrangement, the exact terms of his relation of privity to the pending suit, provided this is done by contract with the insured. When the privity is established by notice, we go to the general law of warranty to ascertain its effect. When the privity rests upon special contract, we must seek its character, scope and effect from the contract. Now this is precisely what was done in this case. After notice of the claim, the re-insurers came forward and entered into a compact of privity with the United States Insurance Company, as set out in the contract of July, 1864. The object, inducement and consideration of the compact are all clearly defined, and we perceive that it converted the United States Insurance Company into a trustee for the benefit of the re-insurers in respect to the conduct and management its own lawsuit. It must follow, therefore, that any act of fraud or bad faith on the part of the United States Insurance Company in relation to the subject matter of the compact of privity, strikes down the privity itself; and avoids the beneficial results claimed by the party violating it. In other words, the United States Insurance Company, after a betrayal of the trust and breach of its most important obligations resting on her, cannot claim as against the re-insurers the benefits which would have inured to her had she carried on her obligations in good faith. The beneficial results claimed by her, consist in the contemplated advantages of the privity contained in the compact itself. The record would be evidence against the re-insurers within the limits of the compact. If the compact provided for a liability in a certain contingency, then the record of the suit would not establish an absolute and unconditional liability. The condition or contingency must happen to make it evidence.

3. The compromise settlement of July 24, 1872, was a fraud upon the relation of privity established by the

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contract of July 1864, which avoided and annulled the privity and the beneficial results inuring to the United States Insurance Company by virtue of the privity. In other words, the United States Insurance Company, after its fraud upon the re-insurers, cannot insist that the re-insurers were privies to the suit of Hening & Woodruff, or that the judgment in said suit is binding upon them. That the compromise settlement was a fraud upon the re-insurers is apparent. *a.* It was a secret settlement, months before the day of trial, of the whole claim in controversy. The only subject matter the court could pass upon consisted of this claim against the United States Insurance Company. The precise thing the United States Insurance Company undertook in July, 1864, to resist and defend was this identical cause of action against itself. *b.* An appeal by the United States Insurance Company was impossible, because there is a stipulation in the settlement that Hening & Woodruff should satisfy any judgment that should be recovered. We do not contend that a trustee is bound under all circumstances to appeal. It is a matter resting in his sound discretion. But he violates his duty as trustee when, in advance of the time for exercising his discretion, he surrenders or bargains the right to exercise his discretion. *c.* The settlement, was obtained by a sale to Hening & Woodruff of the claims of the United States Insurance Company against the re-insurers. The main object the re-insurers had in becoming privies to the suit was to secure a successful defense of that suit, which would inure to them as a defense or satisfaction upon the claim against them as re-insurers. *d.* The United States Insurance Company was not an agent of the re-insurers defending a suit against them. She was primarily bound to pay the whole \$120,000, and was without hope of remuneration for at least \$20,000, and as much more as the insolvency of the re-insurers might leave unpaid by them. She was intrusted with the defense under the contract of July 18th, 1864, because of her great interest in the event of

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the suit. She was a trustee as to the re-insurers, and was made so because of her interest in the subject matter of the trust. The re-insurers had the right to rely upon this great interest as their chief security for a faithful and vigorous defense. This security was gone before the trial commenced. Nay, the spectacle is worse than this. The transfer of the claims against the re-insurers was conditional, depending for consummation upon the entry of a judgment. Therefore from the date of the compromise settlement, until the judgment, the United States Insurance Company was the trustee of Hening & Woodruff in respect to these very claims, holding them for their use. She could not sell or transfer them to any one else, having made a conditional sale to Hening & Woodruff. Neither could she release them to the re-insurers themselves. Here, then, we have the spectacle of the United States Insurance Company starting out in this law-suit as the trustee of the re-insurers, and winding up as the trustee of Hening & Woodruff, the common enemy.

4. Measure of damages. The court erred in not giving defendant's instruction as to the measure of damages. The rule of law governing this contract of indemnity is as follows: If the insurer brings his action before payment by himself, his measure of damages is his liability. If he brings it after payment, his measure of damages is the amount paid by him—the amount which satisfied his liability. *Mutual Fire Ins. Co. v. Andes Ins. Co.*, 4 Ins. Law Jour. 820; *s. c.*, 3 Cent. Law Jour. 15; *Pentz v. Receiver*, 9 Paige 568; *In re Republic Ins. Co.*, 8 Bank. Reg. 197; *Norwood v. Resolute Fire Ins. Co.*, 47 How. Prac. 43; *Blackstone v. Allemania*, 4 Daly 299; *Lawless v. Collier*, 19 Mo. 480.

Geo. A. Madill for appellant.

1. The legal effect of the agreement of July, 1864, was not to reinstate the policy or to subject defendant to any

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liability on it as a re-insurer, but was to create a new and distinct agreement, a substitute, whereby the scope and character, as well as the conditions of the defendant's liability for and its relations to this claim were distinctly defined and determined. It was the evident intention of the parties that this agreement should stand in lieu of, be substituted for, the several policies of re-insurance held by the United States Insurance Company as to the claim of Hening & Woodruff. By this agreement, although the claim was defeated, still the defendant was bound to pay its proportion of the expenses of the litigation. No such obligation was imposed upon it by its policy or by the law, if the policy and not the agreement was the foundation of liability, the measure of obligation. Again, by this agreement it was to contribute to the payment of the claim of Hening & Woodruff only in the event of, and not until, a judgment fixing its liability was recovered by them against the United States Insurance Company. If the policy was to remain in force, then it would be bound to pay at any time the United States Insurance Company saw fit to sue it and establish a liability against it under the policy. If the policy and not the agreement created and determined the nature and extent of the defendant's obligation as a re-insurer, then the statute of limitations is a bar to this action, for the loss occurred in 1864, and this suit was not brought until 1875, a period of more than ten years thereafter.

2. But, upon the assumption that the defendant's policy is the ground of its liability to the assignees of the United States Insurance Company, then, in order to make out their cause of action, it was incumbent on the plaintiffs to establish by proofs, among other things, both of the following propositions: 1st. That Hening & Woodruff had sustained a loss of cotton by a peril insured against by the United States Insurance Company, and that such loss exceeded the sum of \$100,000. 2nd. That defendant was liable to the United States Insurance Company as a re-in-



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suror of that risk, the last named company having complied with the terms and conditions of defendant's policy as to notice of shipment, payment of premiums, and the service of the requisite proofs of loss, or that the defendant had waived such compliance. Nothing short of the proof of both of these propositions will answer the exigencies of the plaintiffs' case. Giving the utmost effect to the judgment against the United States Insurance Company, it is conclusive against this defendant only upon the facts named in the first of these heads. *Strong v. Phoenix Ins. Co.*, 62 Mo. 289. As to the others, they were not involved in the case, and could not be determined. Of these there was no evidence offered in this case, and hence the plaintiffs' case must fail. *Chicago v. Robbins*, 2 Black 418; *s. c.*, 4 Wall. 657.

3. The contract of settlement was, as to this defendant, a breach of duty and of trust by the United States Insurance Company, and a fraud in law.

1st. By it the trustee settled absolutely and forever fully six weeks before the suit it had agreed to resist was tried, all liability on its part on account of this claim which, to induce defendant to constitute it a trustee to defend, it had denounced as "illegal and unjust," and declared ought to be resisted and defended. Is it probable that the trustee, while buying its peace and urging its wares upon Henning & Woodruff, with a view to reduce the money payment as much as possible, decried their worth by insisting they would never be valuable because it intended to resist to the utmost, as it had agreed to do, the recovery of any judgment. This trustee may have been very pure, and may have insisted in one breath that in the trade the proposed assignment of policies ought to be estimated highly, and the cash to be paid made correspondingly small, and in the next breath asserted itself "in favor of a vigorous prosecution of the war" of defense—and intended it! This may all be true in point of fact. But courts have too little confidence in human nature to allow it to subject itself to



such severe temptation, when acting in trust relations, and have too much respect for it to countenance the placing of it in any such unseemly posture. And corporations, though soulless, are yet finite, and ought to be at least as carefully guarded and protected. Hence the law says, has always said, and it is to be hoped always will say, that such a transaction, if invoked in aid of the trustee, who was an actor in it, is void upon its face.

2nd. By this agreement not only is the trustee absolved from all further interest in favor of a vigorous defense, but it, in effect, agrees that there shall be no appeal from any judgment rendered in the suit. Before the agreement of July, 1864, was made, it was liable to the plaintiffs in the suit for the full amount of any judgment rendered. And under the agreement it was bound to pay at least one-sixth of it without aid. After the compromise was signed, it hadn't a penny of interest in it, except to avoid further expense. Before the compromise, it had something at stake to lead it to incur expense, submit to trouble, expend time, to save itself from liability. But the moment it made its peace, every dollar expended by it on that defense was so much lost. For if the defense was successful, it would get nothing back which it had paid, and the re-insuring policies would be valueless to it. If the defense failed, it had nothing further to pay on account of the claim, and the re-insuring policies would be gone to Hening & Woodruff. The more vigorous the defense was made the more it would cost the trustee, and without benefit; the less vigorous, the less it would cost it.

3rd. By the compromise, the bone of contention was changed from a real demand against the trustee for \$120,000 to the single purpose of rendering its *cestui que trust* liable, and in this it had not a dollar of interest. And all effected by the trustee without the consent or knowledge of the *cestui que trust*. Yet it remained defendant in the suit. Why? Because by the agreement with its *quondam* adversaries it was bound to do so, in

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order to make the contracts of re-insurance available to them.

4. The fraud in law perpetrated upon the defendant by the United States Insurance Company has never been condoned. The record is destitute of a syllable of proof tending to establish such condonation, or any waiver or ratification by the defendant.

*Thomas T. Gantt* for respondents.

It is found by the jury that the defendant assented to and ratified the agreement of July 24th, 1872: and as this agreement was the only defense interposed, or capable of being interposed by the defendant, and defendant having in its own instructions conceded that the paper was no defense if it assented to its terms, it would seem there was really nothing remaining to be tried, and plaintiffs might pause here with confidence, and ask for the affirmance of the judgment.

The contract of July 24th, 1872, did not in its terms, nor by its legal import, disable the United States Insurance Company from defending to the fullest advantage the action at that time pending in the United States circuit court in favor of Hening & Pearce; and if, in point of fact, after the making of that contract, the United States Insurance Company did, in good faith, and with earnestness, continue to defend the action, presenting all the evidence within its power, making no concessions of law or fact, and interposing every objection, then the compromise agreement furnishes no defense to this action. It will be seen that the plaintiffs offered to prove that such a defense was made, but defendant objected and the court excluded the evidence. In the face of this fact the defendant can not claim that the United States Insurance Company in any way relaxed its efforts in the defense. It seems to follow inevitably that the defendant received to the utmost the benefits and advantages it was entitled to look for from

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the contract of July, 1864; and if it did so, there is either a confusion of ideas or something which might be more harshly characterized, in this persistent opposition to the plaintiffs' demand. Had it not been for that contract of 1864—if the defendant had not urged the United States Insurance Company to defend the claim, and promised to bear its proportion of the expenses whether the defense was prosperous or unfortunate—the United States Insurance Company could have brought suit at once in 1864, on its contract of re-insurance. Of course, in doing this it would have relinquished its own defense to the action of Hening & Woodruff. But on the other hand it could then have surely limited its own liability to \$20,000 (for all the other re-insuring companies were solvent) and would have escaped the protracted litigation which consumed more than eight years and large costs. Clearly, the defendant was largely interested in having the original case defended; and in view of the advantages thus resulting, it made the contract of July 18, 1864.

We think it clear that the defendant could not, by any act of its own, withdraw from that agreement and that all which it was entitled to exact from the United States Insurance Company under that agreement, was a fulfillment of its terms. Those terms demanded, in the language of this court (*Strong v. Phoenix Ins. Co.*, 62 Mo. 289-299), that the contest be carried on in good faith. "The contest is carried on by his consent and acquiescence and for his benefit and protection, and if good faith is observed can there be any reason why the identical question should be litigated twice?"

All the other re-insuring companies were at liberty to come into the compromise arrangement on the same terms as the Marine. If they had done so, the total paid to Hening & Pearce would have been \$55,500, paid absolutely and without any reserve, and then the suit would have been discontinued, nothing remaining to be tried. Instead of paying their portion of this smaller sum, the four out-

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standing companies took the risk of paying \$29,713 each, while the Marine preferred paying \$7,000 as a premium for insurance against the risk of paying the larger sum; and it gained by this prudence. That this is what makes the sting of the affair to the appellant is plain. This is the "*lethalis arundo*" which sticks in the side of the appellant. They saved a large sum of money by their provident action. If they had lost by their attempt to save themselves; if after they had paid a sum of money absolutely the claim had been defeated, and it had thus been shown that they had been needlessly cautious, the sagacity of the appellant in refusing to pay such a price for his security would have been conspicuous, and the appellant would have been in high good humor.

That there was no violation of any trust here is plain, first, because there was no trust property or trust fund; second, there was no appropriation of anything; third, no damage to the re-insurers can be, by any possibility, predicated of any action taken by the United States Insurance Company.

The measure of damages fixed by the instruction given by the court at the plaintiffs' instance, is correct. *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. 137; 3 Kent Com., 279; *Mashall on Ins.*, p. 143; 2 Phillips on Ins., sub-section 2752; *Herckenrath v. American Mut. Ins. Co.*, 3 Barb. Ch. 63.

*Geo. P. Strong* for respondents.

1. The document of July 18th, 1864, was executed not to define or in any way limit or extend the liabilities of the re-insuring companies. It did not in the slightest degree enlarge or diminish the rights or liability of the re-insurers, nor did it impose any additional duty upon or increase any liability of the United States Insurance Company. It was prepared simply to furnish clear and lasting evidence that the re-insurers desired to have the claim of

Hening & Woodruff resisted. All those provisions about the re-insurers being liable to pay, and agreeing to pay, each one-sixth of the loss and one-sixth of the costs and expenses, were mere surplusage, or a simple rehearsal of the obligations created by their respective policies of re-insurance.

But for the existence of these policies there would have been no liability, and the paper of July, 1864, neither added to nor diminished the liability of either party. The United States Insurance Company had a right to defend against the claim, or it had a right, if it deemed the claim a valid one, to pay it without a suit, and without asking the consent of the re-insuring companies. Or, if it was sued, it could recover from the re-insurers one-sixth of whatever judgment might be recovered, together with one-sixth of all the costs and expenses of the suit, and in no way could the re-insurers escape this liability for the results of this litigation, but by notifying the re-insured of their willingness to pay without a suit; the judgment thus obtained would be conclusive against the re-insurers, whether they defended or not, unless they could show that the judgment was obtained by fraud or collusion. The same result would follow if the United States Insurance Company had reinsured the whole risk instead of five-sixths in responsible companies, thereby divesting itself of all pecuniary interest in the result of the litigation.

2. The agreement of July, 1872, did not in the slightest degree affect any interest of the defendant. It only dealt with the rights and liabilities of the United States Insurance Company, growing out of its original contract of insurance with Hening & Woodruff, which were in no way involved in, or affected by the policies of re-insurance. The United States Insurance Company was liable for one-sixth of the loss in any event, if Hening & Woodruff could establish their right to recover, and there is nothing in the paper of July, 1864, which ties its hands, or places it under any obligation to remain pecuniarily in-



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terested in the result of the suit. The only obligation it assumed by that instrument was just the same (no more, no less) than rested upon it without the written instrument; that was, to defend the suit in good faith if suit was brought, and honestly to endeavor to defeat the action. This was all the re-insurer had a right to require, and this was all the re-insured undertook to perform. If this was done, the liability of the re-insurer was irrevocably fixed by the judgment. *Phoenix Ins. Case*, 62 Mo. 298.

3. The claim of defendant that the United States Insurance Company was bound to remain pecuniarily interested in the result of the suit finds no support, either in the language of the document of July, 1864, or in the relation of the parties. The rights of a re-insurer are in no way affected, neither enlarged nor diminished by the circumstance that it has re-insured the entire risk, or that it has only re-insured one-sixth of the risk. In either case it can require that a suit, if brought, shall be defended in good faith, if the insured expects to rely upon the judgment to establish its right to recover against the re-insurer. *New York State M. Ins. Co. v. Protection Ins. Co.*, 1 Story 458; *Hastie v. De Peyster*, 3 Caines 190.

4. The whole question turns upon a matter of fact, viz.: Did the United States Insurance Company defend the suit in good faith? It mattered not how large or how small an interest it might have in the result of the suit. If it honestly, though unsuccessfully, endeavored by all means at its command to defeat the claim of Henning & Woodruff, the re-insurer was bound by the judgment, and would not be allowed in any court again to litigate the same matters. A pecuniary interest is by no means essential in securing a faithful prosecution or defense of a suit at law by an agent. The agreement of July, 1872, only provided for a mode of settling the judgment, if any were obtained; and if the best defense that could be made, was made, how could the defendant in this action be affected, whether the United States Insurance Company was to pay



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the judgment in cash, or made an agreement that Hening & Woodruff should receive part cash, and the remainder in the notes of other parties, or in valid claims on policies of re-insurance? The liability of the re-insurers was created, not by the judgment, but by their policies, and the fact of a loss embraced within the terms of these re-insuring policies. The moment the loss occurred, their liability was fixed. The judgment did not create it. It only ascertained its existence and extent. Why then could not the United States Insurance Company agree to transfer these policies of re-insurance, in discharge of its liabilities, as well as it could transfer any other species of assets?

Defendant assumes that these policies constituted a sort of "trust fund" placed in the hands of the United States Insurance Company, and that in making this compromise it was dealing with trust property for its own advantage, and thereby committing a breach of trust. Nothing can be further from the true theory of the case. These policies were as absolutely the property of the United States Insurance Company as any assets it possessed. It could transfer them to whom it would, without consulting the re-insuring companies, and even against their earnest protest, as freely as if they had been so many negotiable notes. The only trust or agency assumed by the United States Insurance Company, either by virtue of its having re-insurers for a part of this risk, or by virtue of any provision in the document of July, 1864, was that of a simple agent undertaking to employ counsel, and manage through them the defense of that suit. If it did that with fidelity, it performed its whole duty. The only "fraud and collusion" that could affect or destroy the force of the judgment must necessarily grow out of some understanding or agreement between Hening & Woodruff and the United States Insurance Company, that would in some way tie the hands of the insurance company and prevent an honest defense of that suit.

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4. The true measure of damages is the amount named in the policy of re-insurance, provided the loss created a liability on the part of the first insurer to the extent of its policy, and it is immaterial whether this loss has been settled in full, or not settled at all, or settled for a per cent. less than the whole amount. *Strong v. Phoenix Ins. Co.*, 62 Mo. 289; *Lee v. Frat. Mut. Ins. Co.*, 1 Handy 231; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443.

HOUGH, J.—It is urged by the defendant that the contract of July 18th, 1864, altered the relations of the re-assured and re-insurers, as they existed under the policies of re-insurance, and irrevocably committed to the United States Insurance Company, the defense of the suit brought by Hening & Woodruff against it in the circuit court of the United States, and made said company a trustee as to the policies of re-insurance held by it; that the contract of July 24th, 1872, by which it stipulated for the assignment of said policies in satisfaction of any judgment which might be recovered against it, rendered said company incapable of further conducting such defense; that it was a fraud in law upon the rights of the defendant; that the cause was really settled at the time it was tried, and the judgment obtained therein a collusive one and not binding upon the defendant.

As much of the argument of counsel has been directed to a consideration of the legal effect of the contract of July 18th, 1864, it may be well to briefly advert to the nature of the duties and obligations arising out of the relation of insurer and re-insurer, which existed between the United States Insurance Company and the defendant at the time that contract was entered into. A contract of re-insurance creates no privity between the re-insurer and the original assured. *Herckenrath v. American Mutual Ins. Co.*, 3 Barb. Ch. 63. The re-assured is not obliged, in order to maintain his action against his re-insurer, to show that he has

1. RE-INSURANCE:  
rights and duties  
of the parties to  
the contract:  
judgment: no-  
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July 18th, 1864, it may be well to briefly ad-  
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tions arising out of the relation of insurer

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paid the loss. He may at once resort to his action against the re-insurer, and to such action the re-insurer may make the same defense which the re-assured could make against the original assured; or, the re-assured may await a suit by the first assured, give notice of it to his re-insurer, and, on being subjected to damages, recover them, together with the costs and expenses of the litigation against the re-insurer. *Strong v. Phoenix Ins. Co.*, 62 Mo. 298; *Eagle Ins. Co. v. Insurance Co.*, 9 Ind. 443; *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. 137. In the case of the *New York State Marine Ins. Co. v. Protection Ins. Co.*, 1 Story C. C. Rep. 458, Judge Story, in commenting upon the relation sustained by the re-insurers to the re-assured, said: "If notice of a suit, threatened or pending, upon the original policy, be given to the re-assurers, they have a fair opportunity to exercise an election whether to contest or admit the claim. It is their duty to act upon such notice, when given, within a reasonable time. If they do not disapprove of the contestation of the suit, or authorize the party re-assured to compromise or settle it, they must be deemed to require that it should be carried on; and then, by just implication, they are held to indemnify the party re-assured against the costs and expenses necessarily and reasonably incurred in defending the suit."

In the case of *Strong et al v. The Phoenix Ins. Co.*, 62 Mo. 299, this court, in commenting upon the foregoing observations of Judge Story, said: "If a *bona fide* judgment is rendered against the original insurer, and he has contested the matter in good faith for the protection of the re-insurer, and the latter is bound to pay the costs and expenses incurred for his benefit, why is he not equally bound by the judgment? It would be a singular position to take, to say that the re-insurer was bound by the incident and not by the principal. The contest is carried on by his consent or acquiescence, and for his benefit and protection, and if good faith is observed, can there be any reason why the identical question should be litigated

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twice? The re-assured and the re-insurer stand in the precise relation of all other parties, where there is a liability over, and the result of one litigation binds or concludes both." It will thus be seen that in all cases where the re-insurers do not, after notice of suit threatened or begun on the original policy, disapprove the contestation thereof, the re-assured shall thereby be deemed to have been required by them to defend the same, and such defense when made in good faith, for the protection of the re-insurers, will render any judgment obtained by the original assured in such suit, binding upon the re-insurers, as to all matters which could have been litigated therein, and make them liable also for the costs and expenses of the litigation. It necessarily follows that in all cases where the re-insurers fail, after notice, to participate in the defense, the original insurer, by operation of law, becomes *sub modo* their agent for the management of such defense, and in the conduct thereof is bound to exercise the utmost good faith: and any judgment against him, collusively obtained, would not support a recovery over against the re-insurers.

Such being the relations which the law established between the re-assured and the re-insurers at the time the contract of July 18th, 1864, was entered in—  
2. —: agreement for resistance construed. to, let us examine the terms of that contract and see wherein it varied their respective duties and obligations. The contract begins by reciting the claim of Hening & Woodruff against the United States Insurance Company for the sum of \$120,000, for cotton burned on the 9th day of June, 1864; also an existing liability on the part of the defendant, and other companies, to the United States Insurance Company, as re-insurers of that company; the belief of all said companies that the claim preferred was illegal and unjust, and a desire that it should be resisted: and in consideration thereof it was agreed that the United States Insurance Company should employ such counsel as it saw proper to manage the defense, and in the event it should succeed in such defense, the re-insurers agreed to

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pay their *pro rata* proportion of the attorneys' fees and costs, and in the event the United States Insurance Company should fail in said defense they agreed to pay their *pro rata* proportion of the judgment, attorneys' fees and costs.

It is perfectly plain that under this contract the United States Insurance Company undertook no duty which the law would not have imposed upon it under the circumstances recited in the preamble, if the foregoing contract had never been made. In the absence of any such agreement, it would, under the circumstances, have been its duty to employ counsel and make a faithful defense. It is equally plain that the defendant incurred no obligation which the law did not impose upon it as re-insurer, saving and excepting the stipulation to pay its share of the expenses of the suit, in the event the defense was a successful one: for it was already bound to pay its proportion of any judgment which should be fairly obtained against the United States Insurance Company, together with its share of the expenses. Such liability was one of the existing facts recited in the preamble. With the exception noted, therefore, this contract is nothing more than a recital of the then existing condition of things, and an enduring memorial thereof. This contract does not, in any particular, supersede the contracts of re-insurance, but simply recognizes the duties and obligations flowing from the policies and arising out of the circumstances of the case. The additional obligation assumed by the re-insurers in respect to the fees of counsel, was supplemental in its nature and did not in any way affect the policies. It could as well have been entered into by itself on a simple notice to defend, and in such case it is plain that the policies would have remained unaffected. If the re-insurers, under the circumstances recited in the contract, had entered into no agreement with the United States Insurance Company for the defense of the suit, the defense thereof would have been as fully committed to that com-



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pany as it was by the terms of the contract. But it is very clear that in such case the re-insurers would not, by their silence or inaction, have irrevocably committed such defense to the re-assured. A failure to come in in the beginning, would have constituted no abandonment of their right to defend. At any time during the progress of the cause, they would have been entitled, as parties who were to be bound by the judgment, to interfere for the protection of their own interests. So, under the contract, the defense of the suit was committed to the United States Insurance Company, but not irrevocably so. There was no stipulation for the exclusive right to defend the suit, nor was there any consideration for such a grant of authority. The United States Insurance Company gave nothing, promised nothing, for the exclusive and irrevocable power and authority to defend against the claim of Hening & Woodruff, and we strongly incline to the opinion that after the agreement to make common cause in the defense of the suit, and the stipulation that the United States Insurance Company should employ the attorneys and the re-insurers should share the expense of their employment, the attorneys employed represented the re-insurers as well as the re-assured. They were then as fully identified with the cause as it was possible for them to be: as much so as if they had themselves employed the attorneys and the United States Insurance Company had, under an agreement to that effect, contributed its share of the expense. If this view be correct, it is quite evident that the re-insurers are conclusively bound by the judgment rendered against the United States Insurance Company, notwithstanding the agreement of July, 1872.

But conceding that the attorneys employed under the agreement of July 18th, 1864, were not the attorneys of the re-insurers, and did not represent them, but were the attorneys solely of the United States Insurance Company, the re-insurers were clearly at liberty to participate in the defense of the suit whenever they felt it to be their inter-



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est to do so, notwithstanding the contract of 1864. The United States Insurance Company was, at most, the agent only of the re-insurers to make defense for them, so far as their interests were concerned, and a permanent pecuniary interest in the result of the litigation on the part of said company, was not essential to the creation or continued existence of such agency. Such agency might, with equal propriety, have been created and continued until the close of the litigation, although the United States Insurance Company had re-insured its entire risk. The creation of this agency, conceding it to be such, and this is the most that can reasonably be claimed by the defendant, was undoubtedly founded upon the trust and confidence reposed by the re-insurers in the purpose and undertaking of the United States Insurance Company to honestly, and in good faith, defend the suit; and the real inquiry at last is, whether such defense was made, or whether the trust was disappointed and the confidence abused? and this brings us to a consideration of the nature and effect of the contract of July 24th, 1872, which contract, the defendant contends, disabled the United States Insurance Company from making a genuine defense.

This contract has been denominated a "contract of settlement," and declared by the counsel for defendant to be a settlement of the controversy involved in the litigation between Hening & Woodruff and the United States Insurance Company. This, we think, is an erroneous view of that contract. The contract did not settle the controversy; that was left to be settled by an actual trial of the suit then pending in the circuit court of the United States. The contract simply provided for the satisfaction, in a designated way, of any judgment that might be recovered against the insurance company. This could be done and still the suit could be fairly and honestly defended. This is no unusual thing in litigation. Parties not unfrequently agree that in the event of a recovery the judgment shall be satisfied in a particular way.

3. —: compromise agreement construed.

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No duty, the performance of which the re-insurers had a right to demand of the United States Insurance Company, was required to be violated or neglected by the terms of this contract. It created no conflict between the duty of the United States Insurance Company and its interest. No right of the re-insurers was bartered away; all the re-insurers had a right to demand of the United States Insurance Company was an honest defense, and this contract did not disable them from making such defense. It was not essential, in order to make such defense, that it should have a substantial interest in the controversy. For, if that be so, and an insurer re-insures his entire risk, and the re-insurers fail to come in and defend, after notice to do so, no judgment can be obtained which will be binding on the re-insurers. The validity of the judgment, for the purpose of a recovery over, does not depend upon the absolute interest of the original insurer, but upon the fact that the suit against him has been honestly and fairly defended. Plaintiffs offered to show that such a defense was made by the eminent counsel who defended the original suit, notwithstanding the contract of July 24th, 1872, but the testimony was excluded at the instance of the defendant.

Furthermore, it clearly appears that for about a month before the trial of said cause the defendant was fully aware of the existence of the contract of July, 1872, extinguishing the substantial interest of the United States Insurance Company in the controversy then pending in the United States court, and having taken no steps to interpose a defense for itself, or to prevent any further defense of said cause by said company, it is not now at liberty to deny its capacity to make such defense. Disqualified to make the defense it certainly was not, but if the defendant felt that all inducement to a vigorous and faithful defense was destroyed by reason of the divestiture of its interest in the subject matter of the controversy, and it did not wish to risk the issue of a trial under such circumstances, as a party who was to be bound by the judgment, it certainly

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had the right to bring that fact to the attention of the United States court and to assume control of the litigation for the protection of its own interests. Having failed to do so, it must be considered as having acquiesced in the right of the United States Insurance Company to make the defense, and in the absence of all testimony of any fraud or want of good faith on the part of said company, or its attorneys in making such defense, it must be held bound by the result of the suit. And this view of the case is substantially presented by the second and fourth instructions asked by the plaintiffs.

We agree with the court of appeals in thinking that the case was tried on a theory prejudicial to the rights of the plaintiffs, and that no material error was committed against the defendant.

We see no error in the rule adopted by the circuit court as to the measure of damages. The extent of the liability of the re-insurer is not contingent upon the amount paid by the re-assured, nor upon any payment whatever by him. When a loss occurs which is covered by the policy of re-insurance, the re-assured is entitled to recover, from the re-insurer, not what he has paid, but all that he has become liable to pay by reason of such loss. This is a necessary consequence of the rule that the re-assured may maintain an action against the re-insurer without showing that he has paid the loss. *Strong v. Phœnix Ins. Co.*, 62 Mo. 289; *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. 137; *New York State Marine Ins. Co. v. Protection Ins. Co.*, 1 Story C. C. 458; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Blackstone v. Alemannia Fire Ins. Co.*, 56 N. Y. 104; *Herckenrath v. American Mut. Ins. Co.*, 3 Barb. Ch. 63; *Carrington v. Commercial Fire & Marine Ins. Co.*, 1 Bosw. 152. We are of opinion, therefore, that the judgment of the court of appeals should be affirmed. All concur.

AFFIRMED.

CORRIGAN V. GAGE *et al.*, Appellants.

**City Ordinance: Unreasonableness of: Evidence.** A city ordinance is not conclusive, but may be shown to be unreasonable. In a suit on a special tax bill for the building of a sidewalk, evidence is admissible to show that the ordinance authorizing its construction was unnecessary and oppressive—it being located in an uninhabited portion of the city and disconnected with any other street or sidewalk.

*Appeal from Jackson Special Law and Equity Court.*—HON.  
R. E. COWAN, Judge.

*Gage & Ladd* for appellants.

That the ordinances of a municipal corporation cannot be attacked for an error of judgment, or an apparently unwise exercise of discretion, is true. But, however broad may be the powers of legislation granted to a corporation, however varied the subjects they may affect, or however large the discretion intrusted to it, its ordinances must submit to the test of reasonableness. Whether the question is one for the court or the jury may be doubtful, but in every case where the action or the defense to it is based upon an ordinance or by-law of a corporation, evidence to show its unreasonableness or oppressiveness is material and competent and ought to be heard, and its exclusion is error, otherwise an ordinance might require a sidewalk to be built of gold. *Dillon Mun. Corp.* (2 Ed.) § 253; *Field on Corporations*, § 296; *Mayor of Hudson v. Thorne*, 7 Paige 261; *City of St. Louis v. Weber*, 44 Mo. 547; *Dunham v. Rochester*, 5 Cow. 462; *Commonwealth v. Robertson*, 5 Cush. 438; *Kip v. Patterson*, 2 Dutch. 298; *Clason v. Milwaukee*, 30 Wis. 316; *Commonwealth v. Worcester*, 3 Pick. 462; *Commissioners v. Gas Co.*, 12 Penn. St. 318; *Mayor v. Winfield*, 8 Hump. 707.

*J. C. Tarsney* for respondent.

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The charter gives to the council legislative power to construct sidewalks whenever in their discretion they are deemed necessary. Their decision as to the expediency or necessity of the exercise of their power is not subject to review by the courts. *Hoffman v. City of St. Louis*, 15 Mo. 607; *McCormack v. Patchen*, 53 Mo. 33. The evidence offered was therefore inadmissible.

SHERWOOD, C. J.—Suit on a special tax bill issued by the city engineer of the City of Kansas in favor of plaintiff and against a lot owned by defendants.

The suit was brought before a justice of the peace and by the defendants appealed to the law and equity court. The tax bill was one of many issued to the plaintiff as the contractor for the building of a sidewalk three blocks in length upon one side of a street on which defendants' lot fronted.

The ordinance directing the construction of this sidewalk was approved July 23rd, 1873.

The charter provisions upon the subject, in force at that time, were section 25 of an act of the General Assembly, approved February 28th, 1872, (Sess. Acts, 1872, p. 408,) and section 3 of an act approved March 22nd, 1873, (Sess. Acts 1873, p. 284).

On the trial the plaintiff read in evidence the tax bill sued on, and rested. The defendants then called H. H. Skiles as a witness, who having first testified as to his familiarity with the locality, and otherwise established his competency as witness upon the matters in question, was by the defendants asked to state the location of said walk, the situation and condition of the land in its vicinity; whether the same was improved or occupied, the number of residences or places of business in the neighborhood or vicinity of said walk, fronting thereon, and any other facts within his knowledge as to the necessity or usefulness of said sidewalk.

The plaintiff objected to the question, on the ground



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that the action of the common council of the City of Kansas in the passage of the ordinance providing for the building of said walk, was conclusive on the defendants, and that the necessity or reasonableness of the ordinance could not be inquired into.

The defendants then stated that their object in asking the question, was to prove, and they then and there offered to prove by the witness, that the sidewalk ran north and south along the east line of Skiles and Western's addition (in which defendants' lot was situated) to the City of Kansas; that none of the lots situated along said sidewalk, and fronting thereon, were fenced or occupied in any way; that on the east side of that part of Liberty Street, facing said walk for the space of one-quarter of a mile east thereof, the ground is and was wholly unfenced and uninhabited; that there is and was one small shanty at the extreme southern end of said walk; that said Skiles and Western's addition is in the extreme southwestern portion of the corporate limits of the City of Kansas; that south of said addition and of said walk, it is open and unoccupied ground for the space of a mile; that teams traveling to and from the State of Kansas pass over the lots in said addition, and the land south thereof, without reference to the located streets and without objection from the owners of the property; that there are no persons living in the vicinity excepting the family living in the shanty before mentioned, by whom the sidewalk could or can be advantageously used in going to or from their homes or places of business; that said walk extends along the east line of Skiles and Western's addition for the space of about eight hundred feet and terminates at the southeastern corner thereof, and does not there connect with any other sidewalk or any traveled street; that the building of said walk was wholly unnecessary and useless, and could and does subserve no useful purpose; that the northern part thereof is in wet weather submerged and at some points is habitually crossed by teams and has thereby been ruined,



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and that there was not at the time of the passage of said ordinance and never has been any apparent or actual, or possible use or necessity, present or prospective, or pretense of such use or necessity of a sidewalk along said street, and that the ordinance is entirely unreasonable and a gross imposition upon the owners of property on said street.

The court sustained the objection to the question, and would not permit the defendants to prove by the witness the facts so offered to be proven. Defendants offered to prove the same facts by other witnesses, who were sworn, but the evidence was excluded. The defendants excepted to the ruling. There being no further evidence offered, the jury found for the plaintiff, and the case comes here by appeal.

The only question for our consideration is in reference to the admissibility of the evidence offered. The plaintiff had made out his case *prima facie* on production of the tax-bill, and there can be no question but that the city was, under the charter, authorized to have work done of the description specified in the bill sued on. The admissibility of the evidence depends upon the point whether the ordinance of a city, passed in pursuance of its charter, can be assailed in the manner attempted in the case at bar. Speaking in general terms, the authorities of a city may be said to have a large discretion as to the necessity or expediency of the ordinances which they adopt. But their powers in this regard are by no means omnipotent; otherwise the citizens would be without remedy or redress. Those powers must be exercised within the bounds of reason and apparent necessity; they must not impose a burden without a benefit, and the reasonableness of their exercise is a fit subject for inquiry. This principle has been expressly recognized by this court, Judge Bliss saying: "That corporations have none of the elements of sovereignty; that they cannot go beyond the powers granted them, and that they must exercise such granted powers in a reasonable manner, are

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propositions that cannot be disputed." *City of St. Louis v. Weber*, 44 Mo. 547. This doctrine is one of general recognition as shown by the authorities cited by defendants, and is not gainsaid by those of our own State, cited by plaintiff, when those cases are rightly considered with reference to the point under discussion. If the testimony offered by defendants set forth the facts of the case, then the ordinance for the paving of the sidewalk in question, in an uninhabited portion of the city, and totally disconnected with any other street or sidewalk, was altogether unreasonable and oppressive, and presents such features as loudly invoke judicial inquiry. Judgment reversed and cause remanded. All concur.

REVERSED.

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GAUSEN V. BUCK *et al.*, Appellants.

**Constitution of 1865, Double Liability of Stockholders.** Under section 6 of the constitution of 1865, as amended, a stockholder in a corporation can not be made liable to a creditor when his stock is fully paid up. *Schricker v. Ridings*, 65 Mo. 208 followed.

*Appeal from Johnson Circuit Court.*—HON. F. P. WRIGHT,  
Judge.

*Land & Jetmore* for appellants.

*G. N. Elliott* for respondent.

HUGH, J.—This was a proceeding upon motion under the 13th section of the first article of chapter 37, Wag. Stat., against the defendants as stockholders in the Warrensburg & Marshall Railroad Company. It was admitted at the hearing of the motion that the defendants had fully paid the railroad company for all the stock subscribed for and by them.

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This record presents precisely the same question which was considered and decided by this court in the case of *Schricker v. Ridings*, 65 Mo. 208, and following the ruling there made, the judgment, which was for the plaintiffs, will be reversed and the cause remanded. All concur.

REVERSED.

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THE STATE *ex rel.* THE KANSAS CITY NATIONAL BANK, *Plaintiff in Error* v. BOOTHE.

1. **Executions: MONEY IN CUSTODIA LEGIS.** Money in the hands of a sheriff collected on execution is *in custodia legis*, and is not subject to levy on a subsequent execution against the plaintiff in the first.
2. ———: **ATTACHMENT—SALE: PROCEEDS IN HANDS OF SHERIFF.** Personal property of W. was seized under an attachment, and being of a perishable nature, was sold by the sheriff and the proceeds deposited in a bank on his general account. The attachment was afterwards dissolved and an execution issued for the amount of the debt, which was delivered to the sheriff with directions to levy the same on the money in his hands; *Held*, that the money so held by the sheriff could not be seized on execution.
3. **Res Adjudicata.** Plaintiffs having, in the court below, filed a motion for an order to compel the sheriff to levy on certain moneys, the court refused the order. They then, on their own motion, became parties to a garnishment proceeding, involving the same moneys, in which the judgment went against them. *Held*, in a suit on the bond of the sheriff for failing to make the levy that the rights of the parties were *res adjudicata*.

*Error to Jackson Circuit Court.*—HON. SAMUEL L. SAWYER, Judge.

John P. Peat for plaintiff in error.

The money in the hands of the sheriff, the proceeds of the attached property, was held by him in all respects as the property itself would have been, had it remained in specie, and was, therefore, subject to the execution. *Snead*

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*v. Wigman*, 27 Mo. 126; *Oeters v. Ahle*, 31 Mo. 383.

After the dissolution of the attachment, the sheriff held the money in his hands as the bailee of Whitney, the owner. No order of court was necessary to ascertain or identify the money, or the amount, or the ownership. It was his duty to turn it over to the owner or his assigns. Being a bailment and not a debt, it was subject to execution, and it was the duty of the sheriff to levy. *Wood v. Edgar*, 13 Mo. 451; *Drake on Attachment*, §§ 505, 506; *Means v. Vance*, 1 Bailey (Law) 40; *Wheeler v. Smith*, 11 Barb. 345; *State v. Fitzpatrick*, 64 Mo. 185; *State v. Taylor*, 56 Mo. 492.

This case is not like that of money collected upon an execution. There the sheriff is not bound to levy until he has made his return, as in that case the plaintiff in execution has no specific property in the money until the return is made. But here the property was Whitney's when attached; when sold, the proceeds were Whitney's, and continued to be Whitney's, and no order of court was necessary to perfect his right to their return to his possession by the sheriff. But even though it should be contended that this fund was exactly similar to money collected by the sheriff on execution in Whitney's favor, yet, when the special law and equity court made its order of May 26th, 1874, directing defendant, Boothe, to turn over said fund to Charles Whitney, it then became the duty of said Boothe, as sheriff, to levy relator's execution on said fund in obedience to the written demand of relator's attorneys at that time.

*Bryant & Holmes* for defendant in error.

Had the property remained in specie, the officer, after the dissolution of the attachment, would have become Whitney's bailee, by operation of law. *State v. Fitzpatrick*, 64 Mo. 185. But the property being sold prior to the attachment, and the proceeds mingled with the officer's

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own money, he became simply Whitney's debtor for the amount received. *Adams v. Lane*, 38 Vt. 640.

A debt is not subject to an execution directed to the debtor. *Harrison v. Paynter*, 6 M. & W. 387; *Willows v. Ball*, 5 B. & P. 376; *Harding v. Stevenson*, 6 H. & J. (Md.) 264; *Fieldhouse v. Croft*, 4 East 510; *Adams v. Lane*, 38 Vt. 640. Indeed, a debt can, in no case, be reached, except by garnishment, or trustee process as it is called in some of the other States. *Clymer v. Willis*, 3 Cal. 363; *Dickinson v. Palmer*, 2 Rich. Eq. (So. Car.) 407; *Adams v. Lane*, 38 Vt. 640.

It is true that Wag. Stat., p. 616, § 70, authorizes a voluntary payment on execution by the debtor of the defendant in the execution. But it has been held under the New York statute, of which ours seems to be a copy, that where the officer to whom the writ is directed is himself the debtor, a voluntary payment by him would not be authorized by the statute. *Baker v. Kenworthy*, 41 N. Y. 215.

HENRY, J.—On the 13th day of May, 1873, the Kansas City National Bank instituted a suit by attachment against Whitney & Clark. The sheriff, Boothe, the defendant, levied the attachment on personal property belonging to said Whitney, which, by order of the court, was on the 21st day of June, 1873, sold as perishable property under the statute, sec. 27, p. 187, and the proceeds of sale, \$491.20, were deposited by Boothe in a bank to his credit on general account. On the 27th day of March, 1874, the attachment was dissolved, and a judgment rendered by the court in favor of the bank for \$2,118.24, on which an execution was issued and delivered to said Boothe, with directions to levy the same on the money in his hands, the proceeds of said sale. This he refused to do, and the bank filed a motion asking the court for an order requiring Boothe to levy upon, and apply said money to its judgment. This motion was heard and disposed of on the

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26th day of May, 1875, and it appearing to the court that on May 17th, 1874, Boothe had been garnished on an execution issued from the circuit court of Jackson county in favor of John T. Shortridge against said Whitney & Clark for \$263.20, and that Whitney claimed \$300 of the money in Boothe's hands as exempt from execution, said Whitney having, since the attachment was issued, married and become the head of a family, the motion was overruled.

On the same day the bank again demanded of Boothe, in writing, the levy of its execution on said money, and Boothe refused, and returned said execution unsatisfied.

In answer to interrogatories propounded to him by Shortridge, in the circuit court of Jackson county, Boothe on the 23rd day of September, 1874, set up the foregoing facts, and asked the court to make such order in the premises as would protect him. On March 16th, 1875, on its own motion, the bank was made a party to said garnishment proceedings, and asked for an order on Boothe directing him to apply said money to its execution. On May 27th, 1875, the issues in the garnishment proceedings were tried, and the court rendered judgment therein against Boothe in favor of Shortridge, for \$324.40 and costs.

This is a suit by the relator, the bank, against Boothe and his securities, on his official bond, for the failure and refusal of Boothe to levy the bank's execution on the money in his hands as aforesaid.

The two principal questions for determination are: First, could the sheriff have levied plaintiff's execution on the money in his hands? Second, may not defendant rely upon the judgment of the circuit court in the garnishment proceeding, to which the bank was a party claiming said money, as *res adjudicata*?

There is no doubt, that under our statute and at common law, an execution could be levied on money. *Turner v. Fendale*, 1 Cranch 44. But, in that case, it was held that money in the hands of an officer

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money in custo-  
dia legis.



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not yet paid to the creditor, had not become his property, and that "a right to a sum of money in the hands of a sheriff can no more be seized than a right to a sum of money in the hands of any other person." "Money in the hands of a sheriff collected on execution, is not a debt due to the plaintiff in the execution, but is in the custody of the law until finally and properly disposed of. It cannot, therefore, be the subject of attachment or garnishment." 3 Cal. 365. The same doctrine is maintained in *Dawson v. Holcomb*, 1 Ohio 275; *First v. Miller*, 4 Bibb 311; *State ex rel. Wilson v. Taylor*, 56 Mo. 492. The reason why money in the hands of a sheriff, collected on execution, is not a debt due to the plaintiff in the execution, is, that the writ commands the officer to have the money in court on the return day, and until then it does not become the property of plaintiff, nor is the officer his debtor. This principle, and the cases above cited are, therefore, not decisive of the case under consideration.

It rests upon a different ground. The defendant in the attachment suit, when the attachment was dissolved,

had a demand against the sheriff for the proceeds of the sale of his personal property, but as was said by the court in *Adams et al. v. Lane et al.*, 38 Vt. 646, "the identity of the specific money, which was received from the sale of the goods in this case, was in fact lost when the attaching officer mingled the money with his own, and deposited it to his credit in the bank. This deposit, as we understand from the disclosure of the trustee, was a general and not a special deposit, and by making it in this way, and thus mingling the money with his own, the officer became accountable for it in the same way in which he would have become accountable if he had appropriated the money to his own use in any other manner."

If, without an order of sale, he had sold the property and converted the money to his own use, in any manner, the plaintiff would have had the same right to compel the

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sheriff to levy his execution upon such money, as in this case. Neither in this, nor in the case supposed, had the sheriff any money in his hands belonging to the defendant in the attachment proceeding: no specific money which he or any one else could have seized as the identical money belonging to such defendant. The sheriff was liable to the defendant in the attachment suit for a certain sum of money, and a levy of the execution, as required by the bank, would have been, in effect, a levy upon a liability of the sheriff to the defendant in the execution, and as was held by Marshall, C. J., in *Turner v. Tindall*, 1 Cranch, "a right to a sum of money in the hands of a sheriff can no more be seized than a right to a sum of money in the hands of any other person." The dissolution of the attachment released the property and its proceeds from plaintiff's attachment lien, and, as to plaintiff, that property was as if it had never been attached. Any other creditor of the defendants in that suit could, by diligence, have acquired a prior right to the property, either by having it seized on execution or attachment, or, if sold, by having the officer garnished for its proceeds. It is said that the money in the defendant sheriff's hands, bears some analogy to surplus money in an officer's hands after satisfying an execution. This may be admitted, and if the identical money could be reached, it might be attached or levied upon, but if, in the case of a surplus after satisfying an execution, the sheriff has converted it to his own use, there could be no levy upon it. It does not follow because the court might make an order, requiring the sheriff to pay such surplus to the defendant in the execution, that his liability in such a case could be seized under an execution. The execution might be placed in the hands of another officer who could serve a garnishment on the sheriff, and thus secure the appropriation of the surplus to the execution against the defendant entitled to such surplus.

These views, if correct, are decisive of this case, and necessarily lead to an affirmance of the judgment. But

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3. *RES ADJUDICATA* an additional ground upon which such affirmation might be placed is, that the matter is *res adjudicata*. The bank filed its motion in the special law and equity court, asking for an order to compel the defendant, Boothe, to levy upon and apply said money to the payment of its execution. This motion was overruled. The bank then, of its own motion, became a party to the garnishment proceedings in the circuit court, and again set up its claims, and asked to have the money in the sheriff's hands applied to its execution. In that proceeding the judgment was against the bank, from which there was no appeal taken by the bank, and the matter which it now seeks to relitigate is clearly *res adjudicata*. *Langdon v. Raiford*, 20 Ala. 532.

The judgment is affirmed. The other judges concur. Judge HOUGH not sitting.

AFFIRMED.

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THE STATE V. SHOCK, *Appellant*.

1. **Juror:** IMPEACHMENT OF VERDICT. A juror will not be allowed to impeach his verdict by his affidavit that he would not have found the defendant guilty, if he had known that the punishment fixed by law for the crime charged was death.
2. **Murder:** Section 1, p. 445 Wagner's Statutes, provides that every murder \* \* \* which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or *other felony* shall be deemed murder in the first degree. *Held*, that the words "other felony" here refer to some felony collateral to the homicide, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself. They are merged in it, and do not, when consummated, constitute an offense distinct from the homicide. Section 33 p. 450, Wag. Stat., makes them a felony only when death does not ensue. Hence, where a homicide results from blows given willfully and maliciously and with intent to inflict great bodily harm, but without the intent to kill, it does not constitute murder in the first degree. NORTON, J. and SHERWOOD, C. J., dissenting.

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*Appeal from Callaway Circuit Court.*—HON. G. H. BURCKHARTT, Judge.

*Warner Lewis* for appellant.

1. Instruction four is a literal copy of the sixth instruction in *State v. Jennings*, 18 Mo. 442. That case and the one at bar are dissimilar, and as that instruction is an innovation of the common law, the ruling ought not to be extended. In every killing which is not excusable or justifiable homicide, this instruction may with equal propriety be given, and if its latitude be not circumscribed, then by the phrase "other felony" in Wag. Stat., sec. 1, p. 445, relating to crimes and punishments, section 2 of the same article would be rendered nugatory, for a conviction of murder in the first degree might be had in every offense intended to be included in section 2. This instruction is inconsistent with the other instructions given for the State. Malice, ill-will, premeditation, &c., the constituent elements of murder in the first degree, are totally ignored. 2. The affidavit of the juror was offered, not for the purpose of showing misconduct on the part of any of his fellows, but for the purpose of showing mistake on his own part; and therein the case differs from any heretofore decided by this court.

*Edwin Silver* for appellant.

The instruction is wrong. It ignores the instrument with which and the manner in which the whipping of the child was done. The evidence shows that Shock was *in loco parentis*, and, therefore, could lawfully chastise the child. The killing was, therefore, manslaughter, unless it was done with an instrument and in a manner likely to produce death; and because the instruction ignores these elements it is defective and vicious. Under the instruction, whipping with a small switch or an instrument altogether

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unlikely to produce death, if death ensued, would warrant the jury in finding a verdict of murder in the first degree. The instruction is simply to the effect that if great bodily harm was intended, and death ensued, it must be murder in the first degree, no matter if the whipping was done with the most harmless instrument. See *East Pleas of Crown*, p. 261; *Foster Crim. Law*, p. 262, § 4. The evidence shows the instrument to have been a stick about the size of one's thumb at one end, and several feet long, certainly not a dangerous weapon; but even if it were such, still its character and the manner of the beating should not have been ignored in the instruction. *State v. Mitchell*, 64 Mo. 191; *State v. Linney*, 52 Mo. 42. It was altogether a question for the jury whether the instrument with which the killing was done was a dangerous weapon, or the instruction is vicious because in conflict with the *Sloan case*, 47 Mo. 615.

It ignores willfulness, deliberation, &c., and it is contended that this is no error, as the defendant was committing another felony, viz: great bodily harm, and the *Green case*, 65 Mo. 648, and the *Jennings case*, 18 Mo. 435, are relied on in support of this position. In the *Green case* the defendant was guilty of a felony in resisting the officer who had a warrant for his arrest on a charge of felony, and the instruction was, therefore, correct for that reason. See *Wag. Stat.*, § 18, p. 479. The statute defining murder in the first degree evidently contemplated that the "other felony" should be one different from violence to or upon the person killed; otherwise we could not have any murder in the second degree, or any of the degrees of manslaughter, for murder in the second degree, or manslaughter involves an assault or great bodily harm to the person injured, and, death ensuing therefrom, we would always have murder in the first, and never murder in the second degree or manslaughter. So the mere attempt to do great bodily injury without deliberation, willfulness or intent, would always make murder in the first degree. Why re-

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quire an instruction to contain willfulness, deliberation, &c., in defining murder without the elements of great bodily harm, and on the other hand require neither of them where that element is made a part of the instruction? The result is simply this, as every murder in the first degree involves great bodily harm, there need only be an instruction on that element, and willfulness, premeditation, &c., may be ignored in every case. The boundaries and distinction between murder in the first and second degrees cannot exist if the elements of premeditation, willfulness, &c., are ignored. We, therefore, contend that the "other felony" in the statute must be other than violence to the person injured. *State v. Sloan*, 47 Mo. 614; *People v. Butler*, 3 Parker's Crim. cases 377; *People v. Rector*, 19 Wend. 605. In the *Rector case* Judge Bronson supports the view above contended for, while Judge Cowen takes a different view, holding that if the defendant did not intend death, then it was a felony within the contemplation of the statute. But under this view murder in the first and second degree would be confused. A man under circumstances that would be but murder in the second degree, might intend great bodily harm, and how could it be determined which degree of murder it would be. Judge Bronson, a name of equal if not of greater weight in criminal law, pronounces in favor of the view we contend for. So does the court in 3 Parker's Crim. cases, 377. So does this court in the *Sloan case*, which overruled the *Jennings case*, and was the law till the *Green case*; but the instructions in the *Green case* were good for the other reason above stated.

J. L. Smith, Attorney-General, for the State.

The thirteenth instruction was a correct definition of the crime of murder in the first degree under our statute, and the cases construing it. Section 1, p. 445 of Wag. Stat., provides that "every murder which shall be com-



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mitted \* \* in the perpetration or attempt to perpetrate any felony, etc., shall be deemed murder in the first degree." Section 33, p. 450 of Wag. Stat., makes the person by whose act or procurement great bodily harm is caused to another, guilty of a felony. So that when the defendant beat the deceased with "intent to do him great bodily harm," he was guilty of a felony, and if the deceased died from the injuries received during such whipping, the defendant is guilty of murder in the first degree. *State v. Jennings*, 18 Mo. 435; *State v. Green*, 66 Mo. 631. But the defendant now insists that this instruction cannot apply here, because he stood *in loco parentis* to the deceased, and therefore had a right to chastise him; and that if he died from the effect of such chastisement, the crime was manslaughter only. It will be sufficient to state that not a scintilla of evidence appears tending to show that the deceased was a son, or a ward, or a pupil of the defendant, nor any other facts which show the defendant to have stood *in loco parentis* to the deceased. The defendant was on the stand in his own behalf, and if any such relation had existed, could very easily have stated it.

*L. W. McKinney* for the State.

Instruction No. 13 given for the State is the law. *State v. Jennings*, 18 Mo. 435; *State v. Green*, 66 Mo. 631. Under our law every homicide committed in the attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree. The attempt to do great bodily harm, is, under our statutes, a felony.

HOUGH, J.—At the May term, 1878, of the circuit court of Callaway county, the defendant was indicted for murder in the first degree for the killing of one Robt. Scott. At the November term following, he was tried and found guilty and sentenced to be hanged. Stay of execution was awarded, and the case has been heard here on

appeal. The evidence on the part of the State tended to show that on the 6th day of March, 1878, the defendant beat the deceased, who was a boy between five and six years of age, with a piece of sycamore fishing-pole, about three feet long and one and a half inches in diameter, for some minutes, accompanying his beating with oaths; that he left the room in which he was beating the boy, went into the yard, procured a piece of grapevine about one and one-fourth inches in diameter, returned to the house and resumed the beating, which lasted in all about fifteen minutes. During the beating the child did not scream or cry, but groaned and moaned, and after several days, died of the injuries so received at the hands of the defendant. An inquest was held, at which the body was examined. The child's head was found to be covered with bruises, its back beaten to a jelly and its skull fractured. On the part of the defendant evidence was introduced tending to show that the deceased was very weakly and sickly; that the defendant did not beat it on the day named, and that the wounds on its head were caused by its falling down stairs. The deceased was a son of a cousin of the wife of the defendant, and it appears that it had been at the house of the defendant for about two months, but whether as a visitor or otherwise, the record does not show.

In support of the motion for a new trial an affidavit of one of the jurors was filed, which stated in substance,  
1. JUROR: Im-  
peachment of  
verdict.      verdict, he was of the opinion that the case was not one in which capital punishment should be inflicted, but he was induced to believe that the court had the power to inflict a less degree of punishment; that he and others of said jury were opposed to rendering a verdict in said case that would result in the death of the defendant. It will be sufficient to say on this point that a juror will not be allowed to impeach his verdict on the ground that he would not have found the defendant guilty if he had known that the punishment fixed by law for the crime

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charged was death. The nature of the punishment had nothing to do with the guilt or innocence of the defendant.

The only question of importance presented for our determination, arises upon the action of the court in giving,

2. MURDER ing, at the instance of the prosecuting attorney, the following instructions:

4. "To constitute murder in the first degree, it is not necessary that the fatal beating, wounding or striking be given with the specific intent to kill; it is sufficient if it be given willfully and maliciously, and with the intent to inflict great bodily harm, and death ensue."

13. "If the jury believes, from the evidence, that it was not the intention of the defendant to kill the child Scott, by whipping him, but that he did intend to do him great bodily harm, and in so whipping him, death ensued, he is guilty of murder in the first degree."

It is contended on behalf of the State that the foregoing instructions were fully warranted by the decision of this court in the case of the *State v. Jennings* (18 Mo. 435), and in the *State v. Green* (66 Mo. 631). In the case first named, which was a most atrocious case of lynching, the infliction of which was continued for several hours, under circumstances of the greatest cruelty and brutality, there was no occasion for any effort on the part of the State to make a case of constructive murder in the first degree, as the facts of the case justified the jury in finding the defendant guilty of a willful, deliberate and premeditated killing. The following instruction, however, was given in that case: 6. "If the jury believe from the evidence that it was not the intention of those concerned in lynching Willard, to kill him, but that they did intend to do him great bodily harm, and that in so doing death ensued, such killing is murder in the first degree by the statutes of this State." Judge Ryland, who delivered the opinion of this court, approved this instruction in the following language: "The sixth instruction is correct under the statutes of this

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State (see Crimes and Punishments, R. C., 1845, § 1, 38). Homicide, committed in the attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree. The 38th section makes the person by whose act or procurement, great bodily harm has been received by another, guilty of what is by our law called a felony; that is, guilty of such an offense as may be punished by imprisonment in the penitentiary."

There are two errors in the foregoing extract, which will be made patent by reciting the two sections of the statute referred to. Section 1 is as follows: "Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed murder in the first degree." Section 38, now section 33, is as follows: "If any person shall be maimed, wounded or disfigured, or receive great bodily harm, or his life be endangered by the act, procurement or culpable negligence of another, in cases and under circumstances which would constitute murder or manslaughter, if death had ensued, the person by whose act, procurement or negligence such injury or danger of life shall be occasioned, shall in cases not otherwise provided for, be punished by imprisonment in the penitentiary," &c.

It will be observed that the statute does not say that every homicide committed in the manner therein pointed out, shall be murder in the first degree, but that every murder so committed, shall be murder in the first degree. The object of the first and second sections of the statute, is to divide the crime of murder into two degrees, and they deal with that crime as it existed at common law. This is made manifest by the language of the second section, which is as follows: "All other kinds of murder at common law, not herein declared to be manslaughter, or

justifiable or excusable homicide, shall be deemed murder in the second degree." So that in every case under the first section, the first, though not the sole, inquiry to be made is, whether the homicide was murder at common law; if not, it cannot be murder in the first degree under the statute. Wharton on Homicide, § 184. At common law a homicide committed in the willful and malicious infliction of great bodily harm was murder, though death was not intended; but this was not so because such infliction of great bodily harm was in itself a felony, in the perpetration of which the homicide was committed, but because such infliction of great bodily harm was an act *malum in se*, and the party was, therefore, held answerable for all the harm that ensued. Foster, 259. But as such a homicide, death not being intended, is not a willful, deliberate and premeditated killing, and is not a murder committed in the perpetration or attempt to perpetrate any of the felonies specially designated in the first section, but a simple unintentional killing only, it has been universally classed as murder in the second degree, in those States having statutes identical with our own, with the exception of the words, "other felony." Wharton on Homicide, §§ 40, 190. But as murder in the second degree with us comprehends only such homicides as are intentional but without deliberation, it cannot be so classed in this State. *State v. Wieners*, 66 Mo. 11. How it shall be classed under our statute must depend upon the construction to be given to the words "other felony," in the first section. This brings us to the second error in the statement of Judge Ryland.

This error, which is the most important one, so far as the present case is concerned, consists in the declaration that the thirty-eighth (33) section makes the person by whose act or procurement great bodily harm has been received by another, guilty of felony. This is a very grave error. As before stated, the bare infliction of great bodily harm was not a felony at common law, and it is not made so by statute. The statute says if any person shall receive

great bodily harm by the act, procurement or culpable negligence of another, "in cases and under circumstances which would constitute murder or manslaughter, if death had ensued, the person by whose act, procurement or negligence such injury \* \* \* shall be occasioned, shall

\* \* \* be punished by imprisonment in the penitentiary," &c., that is, shall be guilty of a felony, and punished as therein prescribed, if death does not ensue. Now, upon the supposition that this felony is one contemplated by the words "other felony" in the first section, let us add this qualification to the thirteenth instruction given in this case, and see what its legal effect will be. The instruction will then read as follows: "If the jury believe from the evidence that it was not the intention of the defendant to kill the child, Robert Scott, by whipping, but that he did intend to do him great bodily harm, under circumstances which would constitute murder or manslaughter, if death ensued, and, in so whipping him, death did ensue, then he is guilty of murder in the first degree." Would not such an instruction as this present a palpable contradiction on its face? If the circumstances under which the bodily harm was inflicted were such as to constitute the offense of manslaughter, if death ensued, by this instruction it is, nevertheless, declared to be murder in the first degree. The language adopted in the supposed instruction is, of course, not such as would be used to a jury, as it presents a question of law, but it is pertinent and proper thus to bring together the two provisions for the purpose of determining the construction of the statute. It would seem, therefore, that the offenses mentioned in the thirty-third section are not such as are meant by the words "other felony" in the first section.

We are of the opinion that the words "other felony" used in the first section refer to some collateral felony, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself, and are, therefore, merged in it, and which do not,



when consummated, constitute an offense distinct from the homicide. (Wharton on Homicide, §§ 55, 56, 57, 58, 62.)

Again, the first section declares that all murders committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, burglary or other felony, shall be murder in the first degree. As this section, as before shown, includes only such murders as were murders at common law, it may well be doubted whether the words "other felony" can be held to include offenses which were not felonies at common law. This point, however, we do not now decide, it being unnecessary in the present case. But the statute evidently contemplates such "other felony" as could be consummated, although the murder should also be committed. It says murders "committed in the perpetration, or attempt to perpetrate," any felony. It were absurd to say that there could be an attempt to perpetrate a felony which could not be perpetrated. The statute, therefore, must refer to such felony as may be perpetrated, although the murder is committed. The arson, rape, robbery, burglary may each be perpetrated and the murder also be committed. But when great bodily harm has been inflicted, and death immediately or speedily ensues therefrom, what felony has been committed, either at common law or under our statutes, in addition to the murder? The infliction of great bodily harm is, by the statute, only made a felony when death does not ensue, and when, if it had ensued, the whole offense, including the infliction of the bodily harm, would constitute either murder or manslaughter; but whether murder or manslaughter, would have to be determined by the circumstances of the case, as in other cases of personal violence terminating in death, when the same was not inflicted in the perpetration or attempt to perpetrate some collateral or independent substantive crime. (*Kelly v. Commonwealth*; 1 Grant's cases, 487.) If the instruction given in this case can be upheld, it will convert many cases of unintentional killing, which are manslaugh-

ter only under other provisions of the statute, into murder in the first degree.

These views are in accordance with the construction placed by this court upon an analogous provision of the statute, relating to inferior grades of homicide. The statute defining manslaughter in the first degree is as follows: "Section 7. The killing of a human being without a design to effect death by the act, procurement or culpable negligence of another, while such other is engaged in the perpetration or the attempt to perpetrate any crime or misdemeanor, not amounting to a felony, in cases where such killing would be murder at the common law, shall be deemed manslaughter in the first degree." It was held by this court in the case of the *State v. Sloan*, 47 Mo. 604, that the foregoing section contemplates some other misdemeanor than that which is an ingredient in the imputed offense, otherwise that part of it relating to an attempt to perpetrate a misdemeanor would be wholly nugatory; that where an act becomes criminal from the perpetration or the attempt to perpetrate some other crime, it would seem that the lesser could not be a part of the greater offense. (*Vide, The People v. Butler*, 3 Parker's Crim. Rep. 377; *People v. Skeehan*, 49 Barb. 217; *People v. Rector*, 19 Wend. 605.)

On the facts of this case, we think the jury might properly have been instructed as to the law of murder in the first degree, on the theory of a willful, deliberate and premeditated killing, and also as to the law of manslaughter in the fourth degree. It was to be expected, of course, that the circuit court would, in passing upon the instructions presented at the trial of this case, be governed by the decision of this court in the case of the *State v. Jennings*; but the doctrine of that case and of the case of the *State v. Nueslein*, 25 Mo. 111, in so far as it conflicts with our opinion in this case, is overruled. There is no conflict between this case and the case of the *State v. Green* (66 Mo. 631). In the latter case the defendant, at

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the time of the homicide was resisting an officer under circumstances which made such resistance a collateral felony, both at common law and under the statute. True, the *Jennings case* was cited in support of instructions numbered 3 and 4, given for the State in that case, which omitted the elements of deliberation and premeditation; but those instructions were unlike the sixth instruction in the *Jennings case* and the thirteenth instruction in the case at bar, and are in conformity with this opinion. Neither of them declared that if the defendant did not intend to kill the deceased, but did intend to inflict upon him some great bodily harm, he was guilty of murder in the first degree. The person killed by Green was an officer who had a warrant for his arrest on a charge of felony, and instructions 3 and 4, above referred to, were to the effect that if the deceased read such warrant to the defendant or notified him of his authority to arrest him, and the defendant killed the deceased in resisting such arrest, he was guilty of murder in the first degree. Those instructions were undoubtedly correct, for the reasons heretofore given. The difference between that case and the present one is apparent. The judgment will be reversed and the cause remanded. NAPTON and HENRY, JJ., concur; SHERWOOD, C. J., and NORTON, J., dissent. REVERSED.

HENRY, J., CONCURRING.—The obvious meaning of section 1, art. 2, of the act in relation to crimes and punishments, is that every homicide committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, which was murder at common law, should be deemed murder under that section, and classed with those murders committed by means of poison, lying in wait, etc. It was not intended to enlarge the class of constructive murders, but only to recognize those designated, and assign them their places in the classification made by that section. If the construction contended for by the State prevail, it will nullify many

provisions of the criminal code. For instance: "Every person who shall administer to any woman, pregnant with a quick child, any medicine, drug or substance whatsoever, or shall use, or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall, if the death of such child, or the mother thereof, ensue from the means so employed, be deemed guilty of manslaughter in the second degree." Wag. Stat., § 10, p. 447. If one administer medicine or employ other means, with the intent to destroy the child and the death of the mother ensue from the means so employed, the offense, by the express terms of the statute, is manslaughter in the second degree: yet, under the construction placed upon the first section in the *Jennings case*, as the homicide was committed in the perpetration of a felony, it would be murder of the first degree, notwithstanding the statute expressly declares that it shall be manslaughter in the second degree.

If one assault another with intent to kill, he is guilty of a felony under Wag. Stat., sec. 32 p. 449. If the assault be premeditated, but not deliberate, and death ensue, the offense would be murder of the second degree. If made in a heat of passion, it would be manslaughter, unless the doctrine of the *Jennings case* be correct, under which it would, in either case, be murder in the first degree, because the commission of the homicide was in the perpetration of a felony, thus making what was manslaughter at common law, and murder in the second degree under our statute, murder of the first degree, a result not to be thought of but with abhorrence.

If when great bodily harm is inflicted, under circumstances which, if death ensue, would constitute the offense manslaughter, the offense is to be transformed into murder by construction, how is the 32d section to be distinguished from the 33rd in the application of the construction placed

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upon the 1st and 33rd sections in the *Jennings case*? Every assault with intent to kill, provided for in section 32, if death ensue, must also be transformed into murder of the first degree, whether such killing would be murder of the second degree or manslaughter, under other provisions of the statute. I have selected these from many selections of the criminal code, which illustrate the force and conclusiveness of the argument of my associate who delivered the opinion of the court. If one be indicted under the 33rd section for inflicting great bodily harm, it would be necessary for the jury to find, whether, if death had ensued, the party would have been guilty of murder or manslaughter. If the circumstances were such that, if death had ensued, the accused would have been guilty of either murder, or manslaughter, it would be the duty of the jury to find him guilty of the felony defined by that section. If, however, death ensued, no case would exist for a prosecution under that section, because then the offense would be murder or manslaughter, or excusable or justifiable homicide according to the circumstances under which the homicide was committed, without regard to the second subdivision of section 1. Section 33, by its very terms, recognizes the law to be, that one intentionally inflicting great bodily harm upon another may, if death result, be guilty of murder or manslaughter, the grade of the offense to be determined by the circumstances attending the act, yet the construction contended for utterly denies that, if one intentionally inflict great bodily harm upon another and without intending it, kill him, he can be guilty of any crime but murder of the first degree.

It is clear from the whole scope and spirit of the act that it was intended to mitigate the severity of the common law in regard to murder, but this construction of the first section would make our code more severe. The substitution of the words "neither excusable nor justifiable," for the words "which would constitute murder or manslaughter" in section 33, perverts the meaning of the section

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and expunges that portion which brings it in conflict with section 1. The words "neither justifiable nor excusable" are not equivalent to the words of the statute, "which would constitute murder or manslaughter, if death had ensued," and such substitution is calculated to mislead and draw attention from the real questions under discussion. We have to deal with the section as it is, not as it might have been. The section does not make the infliction of great bodily harm a felony when not excusable or justifiable merely; but to constitute the offense a felony, it must also be inflicted "under circumstances which would constitute murder or manslaughter, if had death ensued." Section 33 not only contemplates cases where the infliction of great bodily harm would be neither justifiable nor excusable, but cases where, in the event of death, the offense would be murder or manslaughter under some other section. If the statute had provided for cases where the infliction of bodily harm was neither excusable nor justifiable, and where it was not declared by any statute to be either murder or manslaughter, there would be no conflict. If section 33 refers to cases where the homicide would be murder of the first degree, by the circumstances of the killing, there is no occasion to resort to the first section to make a case of constructive murder. If it refers to cases which, by the circumstances, would be murder in the second degree, or manslaughter in any degree, a conflict arises which nullifies the express terms of the statute and adds to the class of murders of the first degree almost as many constructive murders as there are sections of the statute defining manslaughter in the different degrees.

The *Jennings case* has been acquiesced in for a number of years, and was expressly approved and followed in the *Nueslein case*, 25 Mo. 111, and this fact, if the doctrine were not clearly wrong, should make this court hesitate to overrule it; but the principle of *stare decisis* does not obtain in criminal to the same extent as in civil cases. A number of adjudications one way, indicates that the law is as they



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have adjudged it to be. In civil cases, where rights of property have been acquired under such decisions, they are adhered to, right or wrong. No such reason applies in criminal cases. That there have been many adjudications announcing the same doctrine on a given subject, is of force as an argument that they correctly declare the law, but I apprehend that men are not to be hanged, or imprisoned in the penitentiary on a clearly erroneous construction of a statute because many others have been so hanged or imprisoned. The doctrine of *stare decisis* has not always been reverently recognized by this court, even in civil cases. *Proctor v. The Hannibal & St. Jo. R. R. Co.*, 64 Mo. 112. Believing that the instruction given by the court, based upon the 33rd section, is palpably erroneous, I concur in reversing the judgment.

NORTON, J., DISSENTING.—As I do not concur either in the conclusion announced by the court, or in the reasoning on which it is based, and as the question involved is one of great importance, it is but proper that my reasons for dissent should be given. The main point of controversy grows out of the action of the trial court in giving the following instruction, viz.: "If the jury believe from the evidence that it was not the intention of the defendant to kill the child, Scott, by whipping him, but that he did intend to do him great bodily harm, and in so whipping him death ensued, he is guilty of murder in the first degree."

It may be announced as a principle well established that when a statute of another State having received judicial construction, is adopted in this State, it is usual and proper to give it the same construction there placed upon it. So, when a statute has been construed by this court, and it is subsequently re-enacted by the General Assembly without alteration or change in any respect, it is to be understood as having been enacted in the sense in which it has been judicially interpreted. The precise question

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presented in this case first arose in 1853, in the case of *State v. Jennings*, 18 Mo. 435, and involved a construction of the same sections of the statute relating to murder in the first degree, and to the crime of inflicting "great bodily harm" upon another, and it was then held that if A intended to inflict upon B great bodily harm, and in so doing death ensued, such killing was murder in the first degree, although A did not intend to kill B. The reason assigned for the conclusion reached was, that under section thirty-eight of the revised statutes of 1845, it was made a felony for one person to inflict great bodily harm upon another, under circumstances neither justifiable nor excusable, and that section one of the same statute, defining murder, declared that every homicide committed by another while perpetrating, or attempting to perpetrate any felony, was murder in the first degree. This construction was approved by the General Assembly in the revised statutes of 1855, when they re-enacted the same sections in the same words, and they again approved it in 1865, by re-enacting in the general statutes of 1865 the same sections without change.

The same question of construction again arose in 1857, in the case of *State v. Nueslein*, 25 Mo. 111, and the construction given to the sections in the case of *State v. Jennings*, was fully approved by an undivided court. The question again arose in the case of *State v. Green*, in 1877, and the above cases were fully sanctioned. The principle was again sanctioned in the case of *State v. Swain*, decided at the present term. I can not, therefore, consent to overthrow both such judicial and legislative construction of the statute relating to what is murder in the first degree, unless it be made clearly to appear, by adjudicated cases based upon the construction of a statute similar to our own, or by incontrovertible reasoning that such construction can neither be maintained on principle nor authority.

The authorities referred to for the purpose of demonstrating that such construction is erroneous fall short of

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establishing the proposition. The principal authority referred to is the case of *People v. Rector*, 19 Wend. 605. In that case the court was called upon to say whether the trial judge committed error in refusing to instruct the jury "that if they came to the conclusion that the prisoner inflicted the mortal wound upon the deceased in an attempt to commit an offense which of itself was less than a felony, then he should not be convicted of murder." This instruction was refused by the trial judge because, as he said, it "was inapplicable to the case." In disposing of the question thus presented, it became necessary for the court to consider two sections of the New York statute relating to murder and manslaughter in the first degree. That relating to murder declares a killing to be murder "when perpetrated by an act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual." That relating to manslaughter provided, as does our statute, "that the killing of a human being, without a design to effect death, by the act, procurement or culpable negligence of any other, while such other is engaged in the perpetration of any crime or misdemeanor not amounting to a felony, or in an attempt to commit any such crime or misdemeanor in cases where such killing would be murder at common law, shall be deemed manslaughter in the first degree." Each of the three judges composing the court delivered separate opinions on the point presented. Judge Cowen was of the opinion that the charge should have been given because the statute defining manslaughter was intended "to reduce the offense to manslaughter in the first degree in all cases where the jury shall find the assailant intended to stop with the commission of a misdemeanor although the blow were aimed at the person." 19 Wend. 593. Judge Bronson held that the charge was properly refused by the trial court because "such a charge could only be proper where the accused was committing, or attempting to commit, some other

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offense than that of intentional violence upon the person killed." 19 Wend. 605. Judge Nelson expressed the opinion that the charge was properly refused because it withdrew from the consideration of the jury the higher offense of murder, under which it might fall under the provision of the statute which makes killing murder, "when perpetrated by any act imminently dangerous to others and evincing a depraved mind regardless of human life, although without premeditated design to effect death." He observes "that within this provision, the offense may be committed where the actual intent at the time may be to commit an offense under the degree of felony; it may be simply to commit an assault and battery, and still if death ensue under the circumstances alluded to in the statute, the killing may be murder." He concludes by saying that "upon the whole he concurs in the conclusion, principally on the first point considered;" this point related to the admissibility of evidence. So that of the three judges only one of them expressed the opinion that the crimes or misdemeanors alluded to in the section defining manslaughter in the first degree related to some crime or misdemeanor other than that of intentional violence upon the person killed. The case cannot, therefore, be properly quoted as an authority to establish the proposition that the other felony referred to in our statute defining murder in the first degree must be a distinct felony from one committed on the person whose death is occasioned by the perpetration, or attempt to perpetrate, a felony. I have been thus particular in analyzing the case of the *People v. Rector*, *supra*, because it is the basis of the opinion expressed by the court of oyer and terminer in the case of the *People v. Butler*, 3 Park. C. C. 377, and of that expressed by Judge Wagner in the case of the *State v. Sloan*, 47 Mo. 604.

Having shown that only one of the three judges in the case of the *People v. Rector*, assented to the principle announced in the case of the *People v. Butler*, and the *State v. Sloan*, it follows that the two latter cases are without

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support by the former, and as the opinion announced by my associates is founded mainly on the above cases it does not rest on authoritative foundation.

It may be conceded that no homicide committed in this State can under Wag. Stat., sections 1, 2, p. 445, be murder in either the first or second degree unless such homicide was murder at common law. That the defendant in killing the child under the circumstances disclosed in the evidence would at the common law have been guilty of murder cannot be questioned. At common law, the intent to do "enormous" or severe bodily harm followed by homicide constitutes murder \* \* \* So "if A only intend to severely beat B in anger from preconceived malice and happen to kill him, it will be no excuse that he did not intend all the mischief that followed, for what he did was *malum in se* and he must be amenable for its consequences. He beat B with the intention of doing him great bodily harm and is therefore amenable for all the harm he did." Whart. on Homicide, sec. 40, p. 40.

So the defendant in this case in the light of the facts developed by the evidence would, at common law, have been guilty of murder. Is this common law murder under our statute murder in the first or second degree or manslaughter in the first degree? Wag. Stat., sec. 1, p. 445, declares that "every murder \* \* \* committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary or other felony, shall be deemed murder in the first degree." If, therefore, the defendant was engaged in the perpetration of a felony in beating the deceased, a child five years old, with a fishing-pole, one and a half inches in diameter, and a grapevine one and one-fourth inches in diameter, in a most cruel manner, and the death of the child was the result, it necessarily follows that the homicide thus committed falls within the statutory definition of murder in the first degree and can be nothing less. That defendant in thus beating the child was engaged in the perpetration of a felony is manifest

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from Wag. Stat., sec. 33, p. 450, which declares that "if any person shall be maimed, wounded or disfigured, or receive great bodily harm, in cases and under circumstances which would constitute murder or manslaughter if death had ensued, the person by whose act such injury or danger to life shall be occasioned, shall be punished by imprisonment not exceeding five years, &c." This statute makes it a felony for any person to inflict great bodily harm upon another under circumstances neither justifiable nor excusable, and it necessarily follows that if the defendant was inflicting, and only intended to inflict great bodily harm on the child under such circumstances and then stop, he was engaged in the perpetration of a felony. If in the commission of this felony, the death of the child was occasioned, whether defendant intended it or not, then the inflexible definition of the statute in regard to what is murder in the first degree characterizes the crime of defendant as of that and of no other class.

In speaking of this subject, Wharton (Whart. on Hom., sec. 58, p. 58.) lays down the rule to be that "where a Legislature thus creates a statutory offense, the statutory definition is absolute." Again in sec. 40, p. 40, "where a statutory line is to be followed it has been held that when the damage intended was such as would probably result in death, it is murder in the first degree, even though the death may have been but incidental to the offender's purpose." Had death not resulted from the severe injuries and great bodily harm inflicted upon deceased, it cannot be denied that for the infliction of the injuries as stated in the opinion of the court and as shown by the evidence, without justification or excuse, the defendant would have been amenable to a prosecution for a felony under section 33. In committing this felony the death of deceased was occasioned, and the statute interposes with its "*absolute rule*" and declares that a murder committed under such circumstances shall be deemed murder in the first degree. There is no ambiguity in the language of the act; it is plain and



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explicit in the declaration that every murder committed in the perpetration or attempt to perpetrate any felony shall be murder in the first degree. "Statutes are to be interpreted according to their natural and obvious meaning and where there is no ambiguity in the language and its meaning and purpose are clear, courts are not authorized either to limit or extend the act by construction." *Cearfoss v. State*, 1 Am. Crim. Cas. 460. I cannot, therefore, accept a construction of the statute which limits the operation of the words, "other felony," only to those felonies which are distinct and separable from a felony committed on the person whose death is occasioned in the commission of the felony.

The felony committed by B in inflicting great bodily harm on A, under unjustifiable or inexcusable circumstances, is no more merged in the killing of A if death is occasioned thereby, than would the felony of B in committing a rape on A, resulting in A's death. If B starts out with a fixed felonious purpose to "inflict great bodily harm" on A, under circumstances neither excusable nor justifiable, without intending to kill but to stop with the infliction of great bodily harm and death ensues, the felony committed in inflicting the great bodily harm is no more merged in the killing than would a rape perpetrated by B upon A, which resulted in the death of A, be merged or lost sight of in the death of A. The crime in either case would be murder in the first degree, notwithstanding the violence used in committing the rape and in inflicting the injuries occasioning the death would necessarily be directed against the person killed and would be the sole cause of the death, though not inflicted with a murderous intent and purpose. It is said in the statute that murder "committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be murder in the first degree." In all these enumerated cases the General Assembly has declared the law that the perpetrator shall be held guilty of murder in the first degree, without fur-

ther proof that the death was the ultimate result which the will, deliberation and premeditation of the party accused sought. Neither of the two specified crimes of rape or robbery could be committed without an assault directed against the person of the one raped or robbed. So there are included in the words, "other felony," a large number of crimes classified as felonies, which could not be committed except by violence directed against the person. It is made a felony by our statute for one person, on purpose and of malice, to cut or disable the tongue, or to cut off or disable any limb or member of another with intent to kill, maim or disfigure him. Now, if A, in feloniously cutting off the tongue of B, or in feloniously castrating him with no other intent than to maim or disfigure him, occasions his death, can it be said that it was not the intention of the Legislature that he should be held answerable for murder in the first degree, although his specific intent was only to maim and not to kill, and that the felony thus committed, being directed against the person whose death was occasioned by its commission was not, for that reason, such a felony as was contemplated by the General Assembly in the use of the words, "other felony," in defining the crime of murder in the first degree?

A further illustration may be drawn from section 33, *supra*, which makes it a felony where any person shall be maimed, wounded or disfigured, or receive great bodily harm, in cases and under circumstances which would constitute murder or manslaughter, if death ensued. Now, if A, with no intent to kill B, but with a purpose to maim him and send him through life a limbless man, should, on purpose, without cause or excuse, cut off the hand of B, the felony would be consummate and complete as soon as the act of maiming was done, and A would be liable to immediate arrest, trial, conviction and punishment for the felony. If B should, thereafter, die within a year, his death being occasioned by the maiming, A would be answerable for the murder, although the act of maiming

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would constitute a necessary ingredient and element of the homicide. Now, the homicide thus committed would be murder at common law. What would this common law murder be under the construction given to the first and thirty-third sections, in the opinion of the court? A could not be convicted of murder in the first degree for a willful, deliberate and premeditated killing, because the facts of the supposed case show that he did not intend to kill, but only to maim; nor could he be convicted of murder in the first degree for killing B in committing the felony of maiming him, because the felonies mentioned in the thirty-third section are said not to be embraced in the words "other felony," used in the first section defining murder. Nor could he be convicted of murder in the second degree, because, as this court has held in the case of the *State v. Wieners*, 66 Mo. 13, an intentional killing must be shown before a conviction can be upheld in that degree. Nor could he be convicted of manslaughter in the first degree, because, before a conviction can be had in that degree the party charged must be shown to have committed the homicide in committing a crime or misdemeanor not amounting to a felony. Every other section of our statute defining manslaughter in the second, third and fourth degrees, would be alike inapplicable, and the result would be that the perpetrator of the common law murder, thus committed, could not, under our statute, be punished at all, if the construction placed upon sections one and thirty-three, *supra*, is to prevail.

In my opinion, the construction placed upon section thirty-three, that it makes the infliction of great bodily harm only a felony when death does not ensue, and that if death does ensue it is made murder or manslaughter, according to circumstances, is not warranted by the language of the act. Whether the infliction of great bodily harm, in cases and under circumstances which, if death ensued, would be murder or manslaughter, is a felony or not, does not depend upon the question whether the party injured

dies or lives, but upon the circumstances under which the act was done; and if the circumstances attending the act do not show justification or excuse, the felony is complete; and if death does ensue, the character or degree of the homicide is not determinable by the provisions of section thirty-three, but by section one of the statute, which provides that a murder committed in the perpetration, or attempt to perpetrate, a felony, shall be murder of the first degree, thereby announcing in unmistakable terms the "absolute rule" before mentioned.

I cannot subscribe to the doctrine announced, that the words "other felony," used in the first section, defining murder in the first degree, refer to some collateral felony, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself, and are, therefore, merged in it. This construction abrogates the section, and under it A, who shoots at B with intent to maim him only, (which is a statutory felony,) and kills C, would be guilty of murder in the first degree; while if the shot intended only to maim had killed B, he would only be guilty of some lower grade of homicide. It is conceded that if the death ensues from the perpetration, or attempt to perpetrate, any of the specified felonies, viz.: arson, rape, robbery or burglary, the offense would be murder in the first degree. Why should it not be so in regard to any other felony? The language of the law is, if the murder is committed in the perpetration of the enumerated felonies, or "other felony," it shall be murder in the first degree. The words "other felony" are comprehensive enough to embrace every felony defined by the statute, and it is for the Legislature, and not for the courts, to restrain their operation. The crime of inflicting great bodily harm, as defined by section thirty-three, is just as susceptible of perpetration, although the murder is also committed as is *rape or robbery*. The rape is consummate when penetration is made by force, and against the will and consent of the person; and if death ensues from the vio-

lence inflicted in the perpetration of the rape itself, the crime of murder under the first section at once appears, although the acts of personal violence to the deceased were necessary and constituent elements of the offense. So it may be said that when A intentionally inflicts great bodily harm on B, under circumstances which the law neither excuses or justifies, the crime of felony is consummate as soon as the "great bodily harm" is inflicted, and he may at once be arrested for the felony, put upon his trial and punished; and if B suffer and linger from the bodily injuries thus received, and die within one year and a day by reason of the "harm" so inflicted, the perpetrator of the offense may be also indicted and put upon his trial for the murder. For if one be convicted of an assault and battery, or assault with intent to kill, and afterwards the injured party dies within a year and a day of the wounds inflicted, such conviction would be no bar to an indictment for murder or manslaughter. Kelly's Crim. Law, § 222, p. 119; 12 Pick. 496; 3 Dev. & Batt. 98; 1 Park C. C. 183; 5 Ind. 527. The crime of inflicting great bodily harm under circumstances neither excusable nor justifiable, which occasioned the death of the person injured, is as separable and distinct from the homicide as is the crime of rape which occasions the death of the person upon whom it is committed, separable and distinct from the homicide. Both are felonies under the statute; and if in committing either, death ensues as a necessary consequence, the law pronounces, with inflexible certainty, the crime murder in the first degree.

In the case of *State v. Green*, 66 Mo. 631, the court instructed the jury to the effect that if the deceased was a deputy marshal of Jackson county, and had in his possession a warrant for the arrest of defendant, and exhibited the same to defendant, and informed him of its contents, and was proceeding in a quiet manner to arrest defendant, and defendant resisted such arrest, and shot and killed deceased to avoid arrest, such killing was murder in



the first degree. This instruction was expressly approved on the authority of the case of the *State v. Jennings, supra*. It is difficult to conceive how the crime of resisting an officer can be committed without personal violence to the officer, and such personal violence resulting in the death of the officer would constitute a necessary ingredient and element of the homicide, and although such violence was directed against the person, it would be murder in the first degree under our statute, as was held in that case. By what authority can it be said that this or that felony is not included in the words "other felony," used in the statute? The words are broad enough to include all. And if we abandon the absolute statutory rule, what test is to be adopted or rule established by which we are to determine whether this felony was intended, and that felony not? The statute is a declaration to all citizens of the State that whoever in committing, or attempting to commit, a felony, commits a homicide, which would be murder at common law, shall be guilty of murder in the first degree.

Nor can I assent to the conclusion announced that the facts of this case, disclosing, as they do, a case of murder at common law occasioned by the infliction of great bodily harm, would justify an instruction for manslaughter in the fourth degree. Wag. Stat., sec. 17 p. 447, defining that grade of manslaughter, could not apply, because the killing must be done under it "by means neither cruel nor unusual, in the heat of passion." The killing in this case was done by the most cruel means, and without heat of passion. Wag. Stat., sec. 18 pp. 447, 448, defines manslaughter in the fourth degree as "every other killing of a human being by the act, procurement or culpable negligence of another, which would be manslaughter at common law, and which is not excusable or justifiable, or is not declared in this chapter to be manslaughter in some other degree." This section cannot be held to apply here, because it is conceded, and the facts unquestionably show, that the killing of the deceased by the accused was murder



at common law, and every manslaughter at common law is governed by Wag. Stat., sections 1, 2 and 7, pp. 445, 446, and is, under these provisions, either murder in the first or second degree, or manslaughter in the first degree.

Judge Ryland, who wrote the opinion in the case of the *State v. Jennings, supra*, in the use of the words "homicide committed in inflicting great bodily harm," used them with reference to the facts involved in the case he was considering. The facts established that the homicide was unquestionably murder at common law, and that the bodily harm inflicted on Willard, whose death resulted, was without any justification or excuse. The language employed by him is, therefore, only open to verbal criticism, which in no manner affects the correctness of the conclusion reached, which was, that "although it was not the intention of those concerned in lynching Willard to kill him, but they did intend to do him great bodily harm, and in so doing death ensued, such killing is murder in the first degree by the statute of the State." It would have been a work of supererogation for the court in that case to have added, after the words "great bodily harm," in the instruction, the words "without just cause or excuse," as there was not a particle of evidence even tending to show such cause or excuse. Had such words been added, it would have been the duty of the court to have further instructed that, under the evidence, there was no just cause or excuse for inflicting the great bodily harm. So in the case at bar; all the evidence showing that the defendant inflicted the beating on the deceased child without the slightest excuse, in a most barbarous manner, as detailed in the opinion of the court, it would have been a useless act for the trial court to have added the words "without justification or excuse," to the words "great bodily harm," where they occur in the instruction, and thus have required the jury to have found a fact which, under the evidence, it would have been the duty of the court to have told them, in another instruction, they could not find.

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The State to use of Edwards v. Bartlett.

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It is true that the court might well, as it did in an instruction, put the case before the jury on the theory of a willful, premeditated and deliberate killing on the part of defendant. While this is true, it is equally true that there was another theory more properly applicable to the facts of the case, upon which the State had a right to demand, at the hand of the court, it should be put to the jury, viz.: that every murder committed in the attempt to perpetrate rape, robbery or other felony, is murder in the first degree, without reference to the question of intent to kill on the part of defendant. I, therefore, think that the court committed no error in submitting the case to the jury on both the theory of a willful, premeditated and deliberate killing, and a killing committed in perpetrating a felony without intent to kill.

SHERWOOD, C. J., concurs in the views above expressed.

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THE STATE *to use of* EDWARDS, *Appellant*, v. BARTLETT.

1. **Pleading**: PETITION: REQUISITES OF CAPTION. The want of a proper statement in the caption of the capacity in which plaintiff sues is not fatal, where it is set out in the body of the petition.
2. **Bond**: ASSIGNMENT OF BREACH. In a suit upon a bond of an administrator, the averment in the petition "in that, said G. T. B., did not, and has not turned over to plaintiff, E., the said sum of \$1,486.41, as by the condition of his said bond, and the order of said probate court, as aforesaid, he was in duty bound to do, though often requested so to do," sufficiently assigns a breach thereof.
3. —: SETTLEMENT NEED NOT BE FILED. In a suit on the bond of an administrator, the settlement made by him need not be filed with the petition.

*Appeal from Butler Circuit Court.*

Suit on administrator's bond—the caption of the petition being as follows: "The State of Missouri to use of

The State to use of Edwards v. Bartlett.

Richard O. Edwards, plaintiff, v. George T. Bartlett, Green L. Poplin, Benj. F. Turner, defendants."

*Lewis Brown* for appellant.

NORTON, J.—This is a suit upon the bond of Bartlett, as administrator of Shelton H. Shrout, deceased; the caption in the petition is as above. After reciting the appointment of Bartlett and the bond, it avers that on December 10th, 1874, Bartlett made a final settlement of said estate, wherein it was shown that he held assets of said estate in the sum of \$1,486. 41. His appointment was revoked and Edwards appointed. This is stated in the petition, as follows: Plaintiff further states that he, plaintiff herein, was, on the 23rd day of June, 1875, duly appointed as administrator of said estate, and thereafter did duly qualify as such administrator, and as such administrator brings this suit.

It was alleged that the bond was forfeited, "in that Geo. T. Bartlett did not, and has not, turned over to plaintiff, Edwards, the said sum of \$1,486.41, as by the condition of his said bond, and the order of said probate court, as aforesaid, he was in duty bound to do, though often requested so to do."

A demurrer to the petition was interposed, alleging the following grounds: 1. There is an improper party plaintiff, to-wit: Richard O. Edwards does not show any interest in the subject matter of this litigation. 2. Because Richard O. Edwards does not aver that he is the administrator *de bonis non* of said Shrout, deceased. 3. Because actionable breaches of said Bartlett's bond are not assigned. 4. Because plaintiff does not file with his petition the settlement, nor a copy of the same, nor account for the absence of the same, that he avers was made by said Bartlett. The demurrer was sustained and judgment entered for defendant, from which the plaintiff prosecutes his appeal.

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The chief ground relied upon is, that Richard O. Edwards is not styled in the caption of the petition as the administrator of the estate of S. H. Shrout. These words are mere *descriptio personae*, and had they been added to the name of Edwards, would have given him no standing in court, unless the fact of his appointment and qualification as administrator had been averred in the petition. In such case the averments in the petition would determine the right of the party to prosecute the suit; and as it is expressly averred that plaintiff was duly appointed administrator, and thereafter did qualify, and as such administrator prosecutes the suit, the omission of the words as administrator of the estate of Shrout is not fatal on demurrer, as the omission is fully supplied and cured by the allegations of the petition. *Higgins v. Hannibal & St. Jo. R. R. Co.*, 36 Mo. 431; *State ex rel. v. Matson*, 38 Mo. 491; *State ex rel. v. Patton*, 42 Mo. 534; *Headlee v. Cloud*, 51 Mo. 301.

The breach of the bond, as copied above, was sufficiently assigned; and the settlement of the former administrator alluded to in the petition, being a mere instrument of evidence to be used in support of the alleged breach of the bond sued upon, it was not necessary to file it with the petition as a part thereof.

The demurrer should have been overruled, and for the error of the court in sustaining it the judgment will be reversed and cause remanded, with the concurrence of the other judges.

REVERSED.

Miller v. Holt.

MILLER V. HOLT, *Appellant*.

1. **The form of an Instrument** determines its character unless a contrary intention is apparent on its face.
2. **Will: DEED: CONSTRUCTION.** One A executed an instrument which purported to be his will, but which was under seal, and which, among other things, contained this clause: "Know all men that I do hereby, on and after the day of my death by this will, grant, convey and assign to N. McD. A., his heirs and assigns, the following described tract of land." N. McD. A. was his son, and had, on the same day, "in consideration of a certain will," entered into an agreement to support his father during his natural life. The instrument was never delivered; *Held*, that it must be regarded as a will and not as a deed.

*Appeal from Andrew Circuit Court.*—HON. H. L. KELLEY,  
Judge.

*Rea & Williams* for appellant.

A will or devise is a disposition of property to take effect after the death of the maker. Burrell's Law Dic., vol. 2, p. 622; Bouvier's Inst., vol. 2, p. 431; Bouvier's Law Dic. The instrument in question is a will and not a deed. An instrument in the form of a will, or deed, whether it be a deed or gift, deed of sale with a good or valuable consideration, or an indenture, will operate as a will, and not as a deed, if by its terms it is to take effect after the death of the maker. Bacon's Abr., vol. 10, p. 480; *Hickson v. Wicham*, Finch 195; *Henry v. Ballard*, 2 Car. L. Rep. 595; *Stewart v. Stewart*, 4 Conn. 316; *Brewer v. Baxter*, 41 Ga. 212; *Hester v. Young*, 2 Kelly 31; *Jackson v. Copenhagen*, 3 Kelly 569; *Symes v. Arnold*, 10 Ga. 506; *Walker v. Jones*, 23 Ala. 448; *Gillham v. Mustin*, 42 Ala. 365; *Matter of Belcher*, 66 N. C. 51; *Daniel v. Veal*, 32 Ga. 589; Bouvier's Inst., vol. 2, p. 448.

*William Heren & Son* for respondent.

HENRY, J.—On the 20th day of October, 1870, Nelson

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McD. Allen and Lewis Allen, his father, entered into the following written agreement :

STATE OF MISSOURI, COUNTY OF ANDREW, }  
October 20th, 1870. }

"I this day, for and in consideration of the benefits of a certain will, which is the last will and testament of Lewis Allen, in regard to a certain tract of land, to-wit, (describing the fifty-four acre tract in controversy,) enter into a bond for the support of the said Lewis Allen during his natural life-time. In case the support from myself (N. McD. Allen) is a good, decent one, then the above described land, at the death of said Lewis Allen, is, by his last will, made on the 20th day of October, 1870, conveyed to the said N. McD. Allen, his heirs and assigns forever, with all its privileges and appurtenances in any wise thereunto belonging. In case the above obligation on the part of N. McD. Allen is not complied with, then the said will is null and void.

" NELSON McD. ALLEN.

" LEWIS ALLEN.

" ISRAEL KNAPPENBERGER.

" HENRY KNAPPENBERGER."

On the same day Lewis Allen executed the following instrument :

STATE OF MISSOURI, COUNTY OF ANDREW, }  
October 20th, 1870. }

"Know all men, and all whom it may concern ; That the following indenture of writing is my last will and testament concerning a certain tract of land which will be described in the following: Know all men, that I do hereby, on and after the day of my death, by this will, grant, convey and assign to Nelson McD. Allen, his heirs and assigns forever, the following described tract of land, to have and to hold the same, with all its privileges and appurtenances in any wise thereunto belonging, and is the tract of land described as follows ; (describing the tract in



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controversy as in the foregoing agreement,) and now, that I acknowledge this to be my last will and testament in regard to the above described tract of land, and for the purpose therein mentioned, and for the benefit of the said N. McD. Allen, and anything in this document to the contrary notwithstanding. I have hereunto set my hand and affixed my seal, signed this, the 20th day of October, 1870.

“LEWIS ALLEN. [SEAL.]

“Attest: ISRAEL KNAPPENBERGER.

HENRY KNAPPENBERGER.”

N. McD. Allen sold and conveyed the land described in said instrument to the plaintiff. After the death of Lewis Allen the said paper, as the last will and testament of Lewis Allen, was admitted to probate by the probate court of Andrew county on the 5th day of October, 1871, on the evidence of the attesting witnesses; but by whom it was offered for probate, or in whose custody it was found, is not disclosed by the evidence. The defendants Snyder and Watson, each had a claim against the estate of Lewis Allen, that was allowed by the probate court, which, on proper proceedings, made an order for the sale of the land in controversy for the payment of debts. The plaintiff, a purchaser from N. McD. Allen, and in possession of the land, filed his bill, praying for an injunction against the administrator of the estate and said creditors, to restrain them from proceeding with said sale. A temporary injunction was issued, and on a hearing of the cause the court made a decree perpetuating the injunction, from which defendants have appealed.

It does not appear from the pleadings, or the evidence, that the instrument admitted to probate, which respondent contends is a deed, was acknowledged or recorded, or was ever delivered to N. McD. Allen, or in his possession. A deed has no vitality until delivered. Delivery is indispensable to its operation as a conveyance. Admitting that in every other respect the instrument is a deed, there being

no evidence whatever proving, or tending to prove, that it was ever delivered to N. McD. Allen, we cannot say that it conveyed him the land in controversy. But, in our opinion, the instrument is a last will and testament, and not a deed. It purports to be a last will and testament—it is attested as such, was probated as such, and the very agreement relied upon by appellant, in pursuance of which it was made, so denominates it. N. McD. Allen, by that agreement stipulated with his father, not for a deed conveying to him a present interest in the land, but “for the benefits of a certain will, which is the last will and testament of Lewis Allen in regard to a certain tract of land, to-wit,” &c. In addition to all these facts, which indicate clearly that it was executed as, and for, a last will and testament, the language of the instrument stamps it as such.

“I do hereby, on and after the day of my death, by this will, grant, convey and assign to Nelson McD. Allen.” A will “is a disposition of real or personal property, or both, to take effect after the death of the person making it.” “The legal declaration of a person’s mind, or intention respecting the manner in which he would have his property or estate disposed of after his death.” “No particular form is requisite to constitute a valid devise. An instrument may thus operate which is to take effect after the death of the maker, although its general form is that of a deed.” Hilliard on Real Prop., vol. 2, p. 501. Here N. McD. Allen took no present interest in the land. He stipulated for “the benefits of a will,” and whether he would ever have any benefit of the will depended upon the manner in which he complied with his obligation to support his father, Lewis Allen. The instrument was a testamentary disposition of the property. Neither party could have supposed that it was a deed. It has none of the features of a deed, except the words “grant, convey and assign,” and a scroll for a seal, while all of its other characteristics are those of a last will and testament. If the intent were clear upon the face of the instrument, that

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the parties designed it to operate as a deed, notwithstanding its form. the courts regarding more the substance than the form, would give effect to that intent; but where such intention is not apparent, and the form of the instrument is that of a will, it must be regarded as a will.

The judgment of the circuit court is reversed. All concur.

REVERSED.

CITY OF KANSAS, *Appellant*, v. CLARK.

1. **Appeal.** When the record shows nothing to the contrary, it will be presumed that an appeal from an inferior court was taken within the time allowed by law.
2. **City Ordinance:** EFFECT OF REPEAL ON PENDING PROSECUTION. The repeal of an ordinance pending a prosecution under it operates to release the defendant, unless it is otherwise provided in the repealing ordinance.
3. **Kansas City Charter:** APPEAL. The City of Kansas has the right of appeal from a judgment of acquittal in a prosecution under an ordinance of the city against gaming. (See Acts 1875, p. 202, § 10.) HOUGH and NAPTON, JJ., dissenting.

*Appeal from Jackson Criminal Court.*—HON. H. P. WHITE,  
Judge.

*Wash Adams* for appellant.

*Chase & King* for respondent.

SHERWOOD, C. J.—The defendant, prosecuted under an ordinance for keeping a gaming table contrary thereto, was convicted before the recorder, and appealed to the criminal court, where the defendant being acquitted, the city has appealed.

I. The transcript from the recorder shows the arrest and conviction, on the 30th day of September, 1874, and

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then a few lines below, the granting of an appeal. We will presume, therefore, that the appeal was taken on the day of the arrest and conviction, since it apparently was granted on that day, and since, also, we may well presume that the recorder would not grant an appeal unless applied for before the expiration of ten days. The motion of the city to dismiss the appeal taken to the criminal court, because not taken within that time, was properly overruled.

II. The provisions of 2 Wag. Stat., sec. 7 of art. 4, p. 895, relative to the effect of the repeal of statutory provisions, has no application to the present case, the present prosecution being founded, not on a statute, but on a city ordinance, there being an essential difference between the two. If, however, the ordinance which counsel for the city refers to in his brief as being of a similar nature to the statute above mentioned, were contained as stated in the bill of exceptions, this would be no doubt sufficient, because the same power which could enact ordinances could also provide that the repeal of them should not affect any pending prosecution; but no such ordinance as that counsel refers to can be found in the record, having, doubtless, been omitted therefrom through inadvertence. In the absence, therefore, of such an ordinance, we must sanction the action of the court in holding that the repeal of the ordinance whereon the prosecution was bottomed abated that prosecution, and in giving on that ground the declaration in the nature of a demurrer to the evidence.

III. The only question remaining is, as to the city's right of appeal from a judgment of acquittal. Our statute, 2 Wag. Stat., §§ 13, 14, p. 1114, has no bearing on this question, as those sections relate only to appeals by the State. Nor do we regard the violation of the ordinance under consideration as a *crime*, since "a crime \* \* \* is an act committed in violation of a *public law*;" 4 Black. Com., 5; a law co-extensive with the boundaries of the State which enacts it. Such a definition is obviously inapplicable to a mere local law or ordinance, passed in pur-

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suance of, and in subordination to, the general or public law, for the promotion and preservation of peace and good order in a particular locality, and enforced by the collection of a pecuniary penalty. *Williams v. City Council of Augusta*, 4 Ga. 509. In the *City of Goshen v. Croxton*, 34 Ind. 239, it was held that though a suit before the mayor to recover a penalty for violation of a city ordinance was instituted by the issuance of a warrant and the arrest of the defendant, yet that such a procedure was but a *civil suit*. In *Baldwin v. City of Chicago*, 68 Ill. 418, it was held that a proceeding by the city for a violation of its charter was *civil* in form and only *quasi criminal* in character, and that the city under a charter provision allowing appeals and changes of venue from police justices in *all cases* was as much entitled as any other suitor to an appeal, although not expressly named in such provision. Here, however, the charter of plaintiff gives direct recognition to the right of the city to appeal "in any judicial proceeding." *Laws 1875*, p. 262, § 10.

Holding these views, we should reverse the judgment and remand the cause, but for the fact that the ordinance whereon this prosecution was based, was repealed, and no ordinance has been preserved in the bill of exceptions authorizing the prosecution of actions for penalties which accrued to the city prior to the repeal of the ordinance which had been violated. Judgment affirmed. All concur, except NAPTON and HOUGH, JJ., who dissent.

AFFIRMED.

HOUGH, J., DISSENTING.—The City of Kansas is authorized by its charter to pass ordinances for the suppression of gaming and gambling houses, and to punish violations thereof by fine and imprisonment. Acts of 1875, 204, 207, art. 3, § 1. Where an offense, which is declared to be a crime by the laws of the State and punishable thereunder, is also made punishable under the charter and ordinances of the city, a conviction, or acquittal, of such

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offense by a municipal corporation court, is a bar to a prosecution for the same offense in the State courts. *State v. Simonds*, 3 Mo. 413; *State v. Cowan*, 29 Mo. 330; *State v. Thornton*, 37 Mo. 360. It would seem, therefore, that a prosecution for gambling, in the corporation court, upon an information filed by the city attorney, should be regarded as a criminal prosecution. In the case of the *State v. Gordon*, 60 Mo. 383, it was held, that exclusive jurisdiction was conferred upon the city of Liberty by its charter to punish certain crimes committed within its corporate limits. It could not certainly be seriously contended that proceedings instituted by the city for that purpose were not criminal proceedings, and surely the fact that the jurisdiction is concurrent instead of exclusive, can make no difference in the nature of the proceedings. The Legislature declares the crime and the city is authorized to punish it. In such cases the city simply exercises a delegated authority; it acts for, and in lieu of, the State, and is, therefore, entitled to appeal in those cases only in which the State would have a right of appeal, if the prosecution were conducted in its name. *Vide*, also, sections 2 and 3 of the act establishing the criminal court of Jackson county, acts 1871, p. 110. Section 10, art. 13 of the city charter, (Acts 1875, p. 262,) does not give to the city a right of appeal in any case. NAPTON, J., concurs.

BOSWELL, *Appellant*, v. DAHLMAN.

**Contract:** MEASURE OF DAMAGES: PRACTICE. Defendant took plaintiff's cattle to fatten until the 1st day of June, at six cents per pound for every pound gained. Defendant was ready to deliver the cattle on the 1st day of June, but plaintiff not being ready to receive them, they were not delivered until the 30th day of July. The trial court having instructed the jury that defendant was entitled to compensation for the extra time at the contract rate; *Held*, error. They



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should have been instructed to allow him what the extra pasturage was reasonably worth; but as all the evidence showed that it was reasonably worth as much as the contract price, this court refused to reverse a judgment in defendant's favor.

*Appeal from Cass Common Pleas Court.*—HON. J. H. PAGE,  
Judge.

*Adams & Sherlock* for appellant.

*J. D. Irvine and J. L. Morrison* for respondent.

NAPTON, J.—This suit was for the recovery of fifty-four head of cattle, and the defendant, in his answer, claimed that he had a lien on the cattle for feeding them from December, 1873, to June 1st, 1874 at six cents per pound for their increase in weight; that on the 1st day of June he drove the cattle to Gun City with a view to deliver them to plaintiff, but he was not there to receive them, and he had to keep them till the 30th day of July, when their entire increase in weight, at the price agreed on, amounted to 10,805 pounds, which, at the contract price, made \$648.30. The plaintiff insisted that the contract price should only govern until the 1st day of June, after which the defendant grazed them on the prairie, and asked the court to instruct the jury that the defendant was only entitled to a reasonable price for feeding the cattle after the 1st day of June. This instruction was refused, and the court instructed the jury to find the contract price up to the 30th day of July. The evidence was all one way, all the witnesses testifying that the contract price was a reasonable one, even after the 1st day of June, and although we think the instruction was wrong in principle, yet, as the jury could have found on the evidence but one verdict, we will affirm the judgment. The other judges concur.

AFFIRMED.

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Nelson v. The Atlantic & Pacific Railroad Company.

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NELSON V. THE ATLANTIC & PACIFIC RAILROAD COMPANY,  
*Appellant.*

**Contributory Negligence:** RAILROAD. A passenger who jumps from a railroad train in motion, not for the purpose of escaping some impending peril, but merely to avoid being carried past the station at which he intended to stop, is guilty of negligence, and, if he sustains injury, cannot recover for it.

*Appeal from Webster Circuit Court.*—HON. R. W. FRYAN,  
Judge.

*John O'Day* for appellant.

Mrs. Nelson's conduct amounted to negligence *per se*, directly contributing to the injuries complained of; hence the court should have so declared, by directing that plaintiff be non-suited. *Flemming v. W. P. R. R. Co.*, 49 Cal. 253; *Richmond v. S. V. R. R. Co.*, 18 Cal. 351; *Gray v. Winter*, 34 Cal. 153; *Kline v. C. P. R. R. Co.*, 37 Cal. 400; *Needham v. S. F. & S. J. R. R. Co.*, 37 Cal. 409; *Moore v. C. R. R. Co.*, 4 Zab. 268; *Runyan v. C. R. R. Co.*, 1 Dut. Ch. 556; *McClurg v. P. R. R. Co.*, 56 Pa. St. 294; *Fletcher v. A. & P. R. R. Co.*, 64 Mo. 484; *Glassy v. H. R. R. Co.*, 57 Pa. St. 172; *Shearman & Redfield on Neg.*, § 11; *McKee v. Powell*, 74 Pa. St. 218; *Gavett v. M. & L. R. R. Co.*, 16 Gray 501.

Where cars pass their usual stopping place, and to avoid being carried beyond his destination, a passenger, when the train is in motion, jumps out, and in so doing sustains an injury, the railroad company is not liable in damages. *Dumont v. N. O. & C. R. R. Co.*, 9 La. 441; *Aspell v. Railroad*, 23 Pa. St. 147; *Able v. I. C. R. R. Co.*, 59 Ill. 131; *Hendricks v. J. R. R. Co.*, 26 Ind. 228; *Jefferson R. R. Co. v. Swift*, Ib. 459; *Knight v. P. R. R. Co.*, 23 La. 462; *Hubsner v. N. O. & C. R. R. Co.*, 23 La. 492; *Curtis v. D. & M. R. R. Co.*, 23 Wis. 152; *Haggard v. C. & B. R. R. Co.*, 26 Ill. 373; *Baddsley v. T. W. & W. R. R. Co.*, 54 Ill. 19; *Hulbert v. N. Y. C. R. R. Co.*, 49 N. Y. 47; *Duncan v. E. & C. R. R. Co.*, 28 Ind. 441; *Aspell v. P. R. R. Co.*, 23 Pa.

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St. 147; *Randolph v. C. & A. R. R. Co.*, 53 Ill. 510; *Davis v. C. & N. W. R. R. Co.*, 18 Wis. 175; *Shearman & Redfield on Neg.*, § 283; *Lucas v. T. R. R. Co.*, 6 Gray (Mass.) 64; *Nichols v. Sixth Ave. R. R. Co.*, 38 N. Y. 131; *Redfield's Railway Cases*, pp. 204, 205.

*J. P. Nixon* for respondent.

HOUGH, J.—In September, 1873, the plaintiff and his wife were passengers on the defendant's road from Vinita, in the Indian territory, to the town of Richland, Pulaski county, in this State. The testimony is conflicting as to whether the train came to a full stop at Richland, their place of destination. However that may be, it is certain that other passengers got off there, among whom was a lady fifty-eight years of age, who was quite feeble; and it is also certain that the servants of the company on the train transacted business with the servants of the company at the station before the train passed. After the train, in leaving the station, had passed the end of the platform, the plaintiff, who, for some reason had failed to get off at the platform, though notified by the conductor shortly before reaching there that they were approaching the station, jumped to the ground from the front end of the rear car while the train was moving at a rate of speed variously estimated by the witnesses at from four to fifteen miles an hour, and signaled his wife, who was a large fleshy woman about fifty-eight years of age, to jump also. Mrs. Nelson jumped from the train into a ditch by the side of the road-bed, the bottom of which was between five and six feet from the lower step of the car, though the servants of the defendant and others attempted to restrain her, and advised her not to jump, as the train would be stopped for her to get off. While the servants of the company were endeavoring to prevent her from jumping, the bell cord was pulled to stop the train, and it was stopped, before the car from which she jumped passed the spot where she fell.

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Her ankle joint was dislocated by the fall, mortification and gangrene ensued, and amputation followed, from the effects of which she died. Plaintiff thereupon brought the present suit under the damage act, and recovered judgment for \$5,000, from which the defendant has appealed.

(If a passenger, by the negligence of the agents of the railroad company, is carried beyond the station where he has a right to be let off, he can recover for the inconvenience, loss of time, labor and expense of traveling back; but if he leaps from the train while in rapid motion ~~in order to avoid being carried beyond his stopping place~~, he does so at his own risk.) *Doss v. M., K. & T. R. R. Co.*, 59 Mo. 37; *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Able v. I. C. R. R. Co.*, 59 Ill. 131; *Chicago & A. R. R. Co. v. Randolph*, 53 Ill. 510; *Gavett v. M. & L. R. R. Co.*, 16 Gray 501; *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 47. In the case of the *Chicago & A. R. R. Co. v. Randolph*, *supra*, it was held that where the plaintiff voluntarily, and without constraint, leaped from the train on the suggestion of the conductor, that he could do so with safety, he could not recover for injuries thereby received, if the danger was so apparent that a prudent man similarly situated would not have attempted the leap. In *Doss v. M., K. & T. R. R. Co.*, *supra*, this court said: "For a person to jump from a car propelled by steam, when it is in rapid motion, may be regarded as mere recklessness; but to step from a car not yet beyond the platform, and whose motion is so slight as to be almost or quite imperceptible, may not be negligence, and whether it is or not, is for the jury to decide from the physical condition of the person and all the attendant circumstances." If a passenger leaps from a train in rapid motion, in order to escape some impending danger to which the negligence of the company's servants has exposed him, and is injured, the company, as the author of the original peril, will be responsible for the consequences, and such passenger may recover for any injuries so sustained by him, provided the danger of remaining upon the train is apparently as great

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as that to be encountered in jumping off. But no passenger has a right to put life or limb in peril merely to avoid the inconvenience of being carried beyond his stopping place, and if he does so, and is injured, he cannot recover for such injury.

(Conceding, then, that the servants of the defendant failed in their duty to stop the train at the station where the deceased intended to get off, it is plain that the act of the deceased in jumping therefrom was the proximate, and in a legal sense the sole cause of her injury, inasmuch as that act was not justified by the previous negligence of defendant) and the recklessness of her conduct is rendered still more apparent when we consider that she jumped from the train against the advice and remonstrances of the servants of the defendant, after she was warned of the danger of so doing, and had been told that the train would be stopped to let her get off in safety. (On the undisputed testimony in the cause, we think the court would have been warranted in taking the case from the jury. There was no disputed question of negligence for the jury to try as in the case of *Doss v. M., K. & T. R. R. Co.*, *supra*. The negligence of the deceased alone occasioned her injury, and the negligence of the defendant in failing to stop at the station did not justify her negligence in jumping from the train. Under these circumstances we cannot comprehend upon what theory the court gave the third instruction for the plaintiff.) That instruction is as follows: "The court instructs the jury that, although Mrs. Nelson may have been guilty of negligence, yet if they believe from the evidence that the conductor of the train, by the exercise of ordinary care and precaution, could have prevented the injury, and that if the jury believe that the proximate and direct cause of injury was the failure to stop the train, the jury will find for the plaintiff." (From what has already been said it is clear that the failure to stop the train was not the proximate and direct cause of the injury. Besides, it has been repeatedly held by this court that when the



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negligence of the plaintiff concurring with that of the defendant has proximately contributed to produce the injury complained of, there can be no recovery unless the injury was the direct result of the omission of the defendant, after becoming aware of the danger to which the plaintiff was exposed, to use a proper degree of care to avoid injuring him.] It is impossible to apply such an instruction to the facts of this case, and if the instruction had properly declared the law, it should not have been given. It would then have been a mere abstraction, and calculated to mislead the jury. It is unnecessary to consider the defendant's instructions in detail. It may be remarked, however, that on the theory that the plaintiff's negligence was a question for the jury, they were generally correct. The judgment of the circuit court will be reversed and the cause remanded. All concur.

REVERSED.

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NORFLEET V. HUTCHINS, *Appellant*.

**Limitations:** COLOR OF TITLE: ADVERSE POSSESSION. Under Wagner's Statute, section 5, page 917, in order to establish a claim to land by possession of a part under color of title to the whole, two things must concur: First, There must be actual possession of part in the name of the whole; Second, The claimant must exercise, during the time of such partial possession, the usual acts of ownership over the whole. Nothing short of the concurrence of these two things for the continuous period of ten years will divest the true owner of his title.

Where it appeared that defendant's grantor, claiming the whole tract in controversy under a void deed, had for two or three years paid taxes on it, and, during that time, had once driven off trespassers, and defendant himself, since his purchase, had paid the taxes, and, some eight or nine years before the bringing of the suit, had put up a house and inclosed a "truck patch" of about half an acre on the land; *Held*, that there was no actual adverse possession of the premises for the statutory period within the meaning of the foregoing rule.



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*Appeal from Greene Circuit Court.*—HON. W. F. GEIGER,  
Judge.

*F. S. Heffernan* for appellant.

*E. Y. Mitchell* for respondent.

SHERWOOD, C. J.—Plaintiffs brought ejectment for a certain tract of land, claiming under one Jacob Shultz. Defendant Hutchins claims under Rountree, who claimed to have purchased the interest of Shultz at execution sale August 22nd, 1863. This suit was brought February 25th, 1875. The deed from Rountree to defendant bears date April 13th, 1865. It was shown on the trial that the deed which Rountree obtained at the sheriff's sale, conveyed no title, so that the only question is, whether defendant and his grantor, Rountree, have had such a possession of the tract in controversy for such a period as will enable defendant to successfully invoke in his defense to this action the statutory bar. As to Rountree, he never had actual possession of any portion of the tract, nor did he exercise any of the usual acts of ownership, save those of paying taxes, and on one occasion driving away from the land a trespasser. And, as to defendant, though he says he took possession immediately upon purchasing, it is evident from his subsequent statements that he never really took possession of any portion of the tract, nor exercised acts of ownership over it, aside from paying taxes, until 1866 or 1867, when he had a house built and a "truck patch" of about half an acre fenced on the land. But even granting that he took actual possession of the land on the date of his purchase, and continuously maintained it thereafter until suit brought, this would not avail him, unless his grantor, Rountree, had previously had such possession of the premises, as would, together with his own possession, answer the requirements of the statute of limitations.

The 5th section of that statute (2 Wag. Stat., p. 917)

provides that: "The possession, under color of title, of a part of a tract or lot of land in the name of the whole tract claimed, and exercising, during the time of such possession, the usual acts of ownership over the whole tract so claimed, shall be deemed a possession of the whole of such tract." The above section has not, that I am aware of, ever been before adverted to but on one occasion, *Bradley v. West*, 60 Mo. 33. In that case it was said, after quoting the section in question: "This section only applies where \* \* the person having the color of title is in possession of a portion of the premises." This we regard as the obviously correct construction of the section quoted. Nor do we think it can be doubted that the possession there referred to of a part of the tract can mean any thing less than actual possession of such portion; because, otherwise, the words in reference to possession of a part of a tract in the name of the whole, would be without meaning. In other words, if the exercise of the usual acts of ownership over the whole tract claimed would be sufficient, it would be but an idle ceremony to take possession of a portion of the tract. But if we take, as we must, the statute for our guide, before the statutory bar can be successfully used as a shield of defense by a party claiming under color of title, two things must concur: First, He must take actual possession of a portion of the tract in the name of the whole tract claimed; Second, He must exercise, during the time of such partial possession, the usual acts of ownership over the whole tract so claimed. Nothing short of the concurrence of these two things for the continuous period of ten years will answer the demands of the statute and divest the true owner of his title.

The general rule respecting constructive adverse possession is, that the possession of a part of the tract under color of title in the name of the whole tract, is sufficient. *Ang. on Lim.*, 405; *Washb. Real Prop.*, p. 118. It will be observed that our statute has superadded to the ordinary acts evincive of adverse possession, the requirement

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of "exercising, during the time of such possession, the usual acts of ownership over the whole tract so claimed." In respect to the strict meaning of adverse possession, a meaning adapted to every variety of circumstances and location, would be extremely difficult, if not impossible to give. It is said, however, that adverse possession in the modern common law is familiar as denoting *disseizin* upon which an adverse title is founded; Ang. on Lim., § 385; the old term *disseizin* being expressive of any act, the necessary effect of which is to divest the estate of the former owner; (Id.) and it is said in *Sparhawk v. Bullard*, 1 Met. (Mass.) 95, that the possession in instances of this sort must be so open and exclusive as to amount to a *disseizin*. Mr. Washburn, in this connection, remarks: "There must be, first, an actual occupancy, clear, definite, positive and notorious; second, it must be continuous, adverse and exclusive during the period prescribed by the statute." 2 Washb. Real Prop., 499. And this seems to be in substance the correct and generally asserted doctrine, as agreed on all hands, as well as in our own State. *Bradley v. West*, *supra*, and cases cited; *Mylar v. Hughes*, 60 Mo. 105, (*loc. cit.* 115). Without undertaking to define with precision what in all cases would be tantamount to an actual or adverse possession within the meaning of the statute referred to, it shall suffice to say that in the present instance there has not been for the statutory period, such a visible, open and notorious or actual possession of a part of the premises in dispute, as would have unmistakably and continuously informed the true owner, for ten years next before suit brought, that Rountree, or defendant, was in actual or adverse possession of a portion of the land sued for. Under this view it becomes entirely immaterial to discuss the declarations of law given or refused. Judgment affirmed. All concur, except HUGH, J., who concurs in the result.

AFFIRMED.

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The Chouteau Insurance Company v. Holmes' Administrator.

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THE CHOUTEAU INSURANCE COMPANY V. HOLMES' ADMINISTRATOR, *Appellant*.

**Corporation:** SPECIAL MEETING OF DIRECTORS: PRESUMPTION OF NOTICE.

When it is shown that a special meeting of the board of directors of a corporation was held, and that a quorum attended, it will be presumed, in the absence of evidence to the contrary, that due notice of the meeting was given to all the directors, and that all the steps were taken which were necessary to constitute it a valid meeting.

*Appeal from Jackson Circuit Court.*—HON. SAML. L. SAWYER, Judge.

This was a suit to recover the amount due upon two assessments on a stock-note given by Nehemiah Holmes, deceased, to the plaintiff company. It appeared at the trial that the assessments were ordered at special meetings of the board of directors, that a quorum of the board was present at each meeting and that Holmes, in his life-time, had paid a portion of the first assessment, but no part of the other. There was no evidence to show that notice of the meetings was given to the directors. Plaintiff had judgment and defendant appealed.

*Gage & Ladd* for appellant.

*R. A. Frame* and *B. Wells* for respondent.

HENRY, J.—It does not appear by express evidence that notices of the special meetings of the board of directors, at which the assessments were made, were given to the directors, although it does appear that a quorum of the directors was present and made the assessments. Nor was any evidence introduced or offered to show that notices were not given. That all the directors must be notified of

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a special meeting of the board is conceded; but the question for determination is, whether, if the meeting be held and a quorum be present, it will be presumed, in the absence of evidence to the contrary, that such notice was given, and all steps taken necessary to constitute it a regular and valid meeting of the board. In *Sargent v. Webster*, 13 Met. 504; *Lane v. Brainerd*, 30 Conn. 577, and *McDaniels v. The Flower Brook Man. Co.*, 22 Vt. 274, it was decided that such would be the presumption. In *Sargent v. Webster* the court observed: "Another objection of the same kind is, that it does not appear that notice of the meeting was given to all the directors. But the contrary does not appear; and it would be hazardous to decide that every vote passed by an aggregate body is void, if it do not appear by the record that all were present. We believe it is not usual, in corporate records, to state how the members were notified. The presumption, "*omnia rite acta*," covers multitudes of defects in such cases, and throws the burden of proof upon those who would deny the regularity of a meeting, for want of due notice, to establish it by proof." The doctrine thus declared, was as distinctly announced in the other cases above cited, and also in the *State ex rel. Bornefeld v. Kupferle*, 44 Mo. 155.

For a contrary doctrine appellant relies upon the *State v. Ferguson*, 31 N. J. L. R. 124; *Stow v. Wyse*, 7 Conn. 215; *Wiggin v. The Free Will Baptist Church*, 8 Met. 301; *People v. Batchelor*, 22 N. Y. 128; *Atlantic Mut. Ins. Co. v. Fitzpatrick*, 2 Gray 279, and *People's Ins. Co. v. Westcott*, 14 Gray 440, in all of which it affirmatively appears, either that no notice, or an insufficient notice, had been given of the directors' or corporation meeting, the proceedings of which were complained of. In the *State v. Ferguson* the court said: "The fifth man was not present, nor was he notified of the meeting." It appeared that the fifth township committeeman had not been notified of the meeting, and of course the presumption of the existence of a fact, which it was proved did not exist, could not be indulged. So in

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the *Atlantic DeLaine Co. v. Mason*, 5 R. I. 463, it affirmatively appeared that Hill, Carpenter & Co. had no notice of a meeting of stockholders at which an assessment on stock had been made. In *Stow v. Wyse*, 7 Conn. 214, parol evidence was admitted to prove that persons named in the vote at a meeting which authorized the execution of a deed for a company, convened and passed that vote without any notice to the other members of the company. In *Wiggin v. The Free Will Baptist Church*, 8 Met. 301, there was evidence of notice, but the notice given was held insufficient. In the *People v. Batchelor*, 22 N. Y. 128, the court based its opinion upon the fact, which was shown by evidence, that the absent alderman had no notice of the meeting of the board. The case of the *Atlantic Mut. Fire Ins. Co. v. Fitzpatrick*, 2 Gray 279, does seem to militate against the cases cited in 13 Met., 3 Conn. and 22 Vt., but there is a very meager statement of the facts, and the opinion on this point is brief and cites no authorities. The case in 13 Metcalf is not mentioned, although two of the four judges then on the bench were members of the court when the case in 13 Metcalf was decided. It certainly was not intended to overrule that case, and it is difficult to determine from the report of the case in 2 Gray, what precise question was before the court. *People's Ins. Co. v. Westcott*, 14 Gray 440, does not support a different doctrine from that held in 13 Metcalf. It turned on the validity of a by-law passed at a special meeting of the company held in pursuance of a notice duly published, "for the purpose of making alterations in the by-laws, and for the transaction of such business as may come before them." At the meeting thus held, the by-laws were altered by making four directors a quorum instead of five, and seven additional directors were chosen. Four of the seven thus chosen were the only directors who were present at the directors' meeting by which the assessment was made. The court, Hoar, J., said: "But a decisive objection to the choice of these new directors is, that in the call for the



meeting at which they were chosen there was no intimation of any purpose to make such election." Expressing a doubt as to the right of the company to elect directors, except at their annual meetings, he added: "No vote to increase the number of directors had been passed at any meeting held for such a purpose." It will be observed that there was a notice, but the court held the notice insufficient and the election void.

We think that the weight of authority on this question is to the effect that notice of a special meeting of the directors of a corporation will be presumed, in the absence of evidence showing that no notice was given. The instructions of the court are open to criticism, but the only one containing a serious error is that given for defendant, as follows: "That there is no evidence in this case to show that either of said meetings was called by the president, or that notice of either of them was, in any way, given to all the members of the board of directors." If we have correctly stated the law, competent proof of the meeting of a quorum of the board is *prima facie* evidence that it was called by the president, if such a call were necessary, and that notice of the meeting was given to all the directors. No error materially affecting the merits of the controversy was committed by the court, and the only serious error was on the side of appellant in the instruction given for him, of which he cannot complain. The judgment is affirmed. The other judges concur. HOUGH, J., not sitting, having been of counsel.

AFFIRMED.

The State v. Thomas and Allen Swain.

THE STATE V. THOMAS AND ALLEN SWAIN, *Appellants*.

1. **Res Gestae.** On the trial of the defendants for murder, testimony was offered and admitted showing that the deceased was seen riding rapidly down the road, and soon after a party of men, among whom were defendants, were seen riding in the same direction, likewise at a rapid gait; that soon after the party passed the witness, a pistol shot was fired, and some one of the party was heard to say: "Did you get him?" and another one replied: "Not yet." Three quarters of an hour later deceased met the same party a mile further down the road, and it was in an altercation which then ensued with one or more of them, that he was killed. The evidence relied on by the State to show who did the killing, was wholly circumstantial. *Held*, that the foregoing testimony should not have been admitted. The occurrences related were not near enough to the homicide in point of time to constitute part of the *res gestae*.
2. **Evidence of Conspiracy.** Such testimony as the foregoing might be received as evidence tending to prove a conspiracy between the defendants and others to effect the death of the deceased, but it should be accompanied by evidence that the defendants were participants in the crime.
3. **Evidence of Good Character.** When the defendant in a criminal case has given evidence tending to establish his good character, he is entitled to have the jury instructed as to its effect.
4. **Absent Witness: IMPEACHING EVIDENCE: CONTINUANCE.** Where, in order to avoid a continuance, the prosecuting attorney, under the act of 1875, (Sess. Acts 1875, p. 104,) consents that the defendant may read to the jury a statement of what an absent witness would swear to if present, as his testimony, the State may, by way of impeachment, give evidence to show that such witness has made a contrary statement; but the jury should be instructed, in explicit terms, that such evidence is received only for the purpose of destroying the effect of the absent witness' testimony, and not as evidence of defendant's guilt.
5. **Accused Testifying for Himself.** A defendant testifying in his own behalf, in a criminal case, has as much credibility attached to his testimony as if testifying in a similar manner in a civil case.
6. **Reasonable Doubt—Captious Doubt.** The court condemns, as an innovation, an instruction that a captious doubt, or a mere possibility of innocence, is not to be regarded as a reasonable doubt.

*Appeal from Newton Circuit Court.*—HON. JOSEPH CRAVENS,  
Judge.

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The court gave the usual instruction as to reasonable doubt, and added that "a captious doubt, or mere possibility of innocence, is not to be regarded as a reasonable doubt."

*C. W. Thrasher and H. C. Young* for appellants.

*J. L. Smith*, Attorney-General, for the State.

SHERWOOD, C. J.—One Jasper Hale, J. O. Swain, and his brothers, Thomas and Allen Swain, the defendants, were jointly indicted for murder in the first degree, in the killing of Paul Marshall; the first count charging all the defendants as principals; the second, Hale as principal, the others as aiders and abettors. Hale was not arrested. On trial had, J. O. Swain was acquitted, and the defendants convicted of murder in the second degree, their punishment being assessed at seventeen years each in the penitentiary, and they appeal here, alleging for the reversal of the judgment against them, many errors as having occurred during the progress of, and subsequent to the trial. In view of the conclusion reached, that this cause must be retried, it is deemed unnecessary to advert to all the exceptions, as the cause, in most particulars, was very well tried, and no objection is perceived to those instructions relating to the different degrees of murder.

The evidence as to who did the killing was altogether circumstantial. It seems from the evidence that defendants, J. O. Swain, Benton Davis and Andrew Curry, went to Newtonia from the house of defendants' father, who lived some five miles south of that town, to see a game of base ball played between two companies. On their way thither they were overtaken by Jasper Hale. On arriving at Newtonia, Thomas Swain and some others of those mentioned, participated in the game. About four o'clock in the afternoon the defendants, J. O. Swain, Hale, Curry, Davis and Thos. E. Pearson, started on horse-back from

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Newtonia on the road in the direction of their homes. Before they had traveled more than about one-quarter of a mile they were overtaken by the deceased, Marshall, who, it seems, was at that time on good terms with all the company, and who rode with first one and then the other of them, for some three miles, when he took a more rapid gait and rode ahead of them, and out of sight—finally stopping at Heilig's house, four miles south of Newtonia, where, on being invited, he hitched his horse and went into the house, by which time it was nearly dark. The nearest and most direct route homeward of the defendants and the party with them, with the exception, perhaps, of Davis and Curry, lay directly past Heilig's house, as shown by the testimony and plat of the witness Moore. The party, consisting of the defendants and those with them, seven in number, who were evidently under the influence of the cup which cheers but also inebriates, soon afterwards rode up in front of Heilig's house, situate some fifteen yards from the Newtonia road, and commenced debating in loud and boisterous tones, not unmingled with profanity, the question whether they should go to Harmony church to attend a religious meeting then in progress there, or should proceed to their respective homes. While the matter was under discussion, Marshall, being in the house, announced his intention of going out to where the party of young men were, and being advised by Mary Heilig not to do so, replied: "The boys won't hurt me," got up and went out into the yard, was recognized by them while there, proceeded out to them, when almost as soon as he got there one of the party rode off; one said, "Are you gone?" one said, "I want peace;" another said, "I do too;" in a few minutes afterward shooting was heard; next the sound of horses' feet going south on the Newtonia road; next the sound of conversation some 150 yards from the house in the direction the horses had gone, and in an hour and a half from that time the body of Marshall, who, it seems, was unarmed, was found about five feet

from the side of the Newtonia road, eighty-five yards from Heilig's house, about sixty-eight yards north of where the party had stopped, riddled with a number of balls of apparently different sizes, and corresponding, it seems, to pistols of similar kinds at the time in the possession of Jasper Hale and Thos. Swain; but there was testimony also conducing to show that the bullets found in the body were all originally of the same size, and that the latter had bought that day in Newtonia a box of pistol cartridges. Of the wounds on the body of the deceased, some were inflicted as if by one or more persons, in a position above him; others by some one on a level with him. The ground, however, where the body was found, only indicated, on examination next morning, a struggle between two men. The tracks of five horses were also found the next morning in and near the Newtonia road, and apparently in the same direction and locality from which the noise of the talking of a crowd was heard to proceed after the shooting, and after the noise of horses' feet was heard going south on the previous night. The testimony of Bridges shows that after Marshall had reached Heilig's house, and been invited in—Bridges on his way home, about 150 yards north of Heilig's house, on the Newtonia road, met Benton Davis and six others going south on that road, and after he had gone half a mile he heard several shots behind him.

The testimony of Lises (who lives on the Newtonia road on Shannon creek, about a mile north of Heilig's house, and close by the spot where that road continues south, and the road to Harmony church forks to the right, and that to Independence school house to the left), shows that about dusk on the evening of the homicide, Marshall passed his house riding south at a pretty good gait, and soon after that, other persons not recognized, came riding along going also at a similar pace and in the same direction and making a noise; that after this party of unknown persons had passed his house and reached the forks of the road before-mentioned, some one cried out, "That is not

the right road, 'Tom," when some one answered, "D—n the right road to h—ll, this is the road I am going;" and the party, thereupon, took the same road Marshall had gone; that soon after these words were spoken, a pistol shot was fired, and some one was heard to say, "Did you get him?" and another one replied, "Not yet." There was also testimony showing that the party with whom defendants were, was repeatedly seen brandishing and firing pistols on their way from Newtonia; that a pistol shot was fired by some one of the party when in the vicinity of Shannon creek or Lisles' house, where Marshall left them, and when he was about 125 yards in advance of the party on his way to Heilig's house.

As to the difficulty which immediately preceded the homicide of Marshall, the testimony tended to show that on the latter coming out to where the party of young men were he asked some question, received rather a saucy answer from Hale; that some rough words passed between them; that Hale was next seen down from his horse; that Marshall immediately collared or throttled Hale, saying to him, "I'll settle with you," and led him off on the road towards Newtonia; that defendants were seen down off their horses, and as well as one or two others of the party, were also trying to preserve peace by calling to Hale and Marshall for that purpose; that this intercession accomplished nothing; that no one, so far as seen, followed Hale and Marshall; that after they had gone some thirty yards on the road towards Newtonia, Davis and Curry started on eastward from Heilig's towards their homes, and had gone about 100 yards when they heard firing; that Pearson, who lived but a short distance north-easterly from defendants, and on or near the Newtonia road leading towards the home of defendants' father, had, after the altercation between Marshall and Hale begun, gone on south on that road about thirty yards, when he heard a pistol fire, and saw its flash; that when he had gone about 200 yards from the scene of the altercation he was over-taken by the



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three Swain brothers, who went along with him on the Newtonia road until they came to a point where they left him and turned off in the direction of their home, which, by a near cut sometimes traveled, could be reached by leaving the Newtonia road near the south-east corner of Heilig's little field, thence going south-west through Hale's father's farm and by his house.

The testimony of the three Swain brothers was not inconsistent with that of the other witnesses, but in many particulars is corroborated thereby. They testify to defendants having vainly endeavored to stop the quarrel; that Hale, on being collared by Marshall, had drawn his pistol, and had it drawn by his side; that Marshall had his right hand back on his hip; that no weapon was seen in Marshall's hands; that Marshall and Hale were some seventy-five yards down the road when defendants got on their horses and the firing commenced; that they rode on, overtook Pearson, as he had stated, left him at the corner of Heilig's field, went on towards their home, and when letting down the fence at Hale's father's house, were overtaken by Hale, who said, "He had killed 'Marshall, the d—d son of a b—h;" that they rode on home, went to bed, where they remained, until under the advice of a neighbor, who had learned that Marshall's brothers were coming to kill them, they went to Col. Freeman's and remained till next day, when they returned home. It was also in evidence by other witnesses, that Hale had marks on his throat, as if he had been throttled by some one; that he made a similar declaration to the one attributed to him about Marshall, that he would have to leave the country or be hung, and that he had left the country. The above is believed to be a correct resume of a voluminous mass of testimony, in the investigation of which, we have been not greatly aided either by the abstract furnished or by the imperfect index to the record.

I. Objection was made to the admission of Lisle's testimony as to the remarks made by some unknown per-

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1. *RES GESTAE.*      sons, and the firing of a pistol at the forks of the road and near his house, just after Marshall had passed. As to who those persons were, is, we think, sufficiently shown to go to the jury. A point of more difficulty is, whether these acts and declarations, and others of a kindred nature, were competent evidence, as part of the *res gestae*; the defendants insisting they are not. In reference to this matter Mr. Greenleaf observes: "There are other declarations which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and its kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances, constituting part of the *res gestae*, may always be shown to the jury, along with the principal fact; and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. The principal points of attention are, whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character," and he cites the familiar instance of the admission in evidence of the cry of the mob who accompanied Lord George Gordon on his enterprise, as being part of the *res gestae*, and as showing the character of the principal fact. 1 Greenl. Ev., § 108. The evidence offered in the *Commonwealth v. Harwood*, 4 Gray 41, as to conversations of men after coming out of a house, and not in the presence of the owner or any of its inmates, re-

specting what had taken place in the house, was held inadmissible to show the house to be one of ill-fame. So in *Davenport's case*, also cited for defendants, 2 Allen 299, evidence of what was said and done by disturbers of the peace in a highway at a considerable distance from a certain house on going to and returning from that house, and not in the presence of the defendant or any of his family, was held inadmissible to show the house a disorderly one. Nor was there any connection shown between the principal acts done and the declarations offered in evidence, in *Merchants Bank v. Berthold*, 45 Mo. 527, and held inadmissible.

In the case at bar, had the shot spoken of by Lisle been fired at the time Marshall and Hale were going up the road in front of Heilig's house, and immediately afterward such question and reply were asked and made as took place at Lisle's, the obvious contemporaneousness and connection between the act done and the words spoken would have been too apparent to have doubted for a moment that such act and words formed part of the *res gestae*, and would, therefore, have been admissible in evidence. Here, however, at least three-quarters of an hour elapsed between the time the party passed by Lisle's and that when the shots were fired which resulted in Marshall's death. We are, therefore, unable to see any connection in point of time between Marshall's death and the acts and declarations occurring prior to the time the party rode up in front of Heilig's house; hence, we hold evidence of such acts and declarations inadmissible, if offered as part and parcel of the homicidal transaction on the ground of relating to the main fact, and of being contemporary therewith. In other words, the principal fact was the killing of Marshall, and we do not conceive that the acts and declarations occurring at Lisle's, or prior to that time, so illustrate and characterize the main fact, as to constitute the whole matter one transaction, and render the admission of the prior occurrences necessary in order to exhibit that fact in its

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true light, and give to it its appropriate effect. *Beaver v. Taylor*, 1. Wall. 637.

II But, though such evidence of other acts and declarations was not receivable as part of the *res gestae*, yet it might be received against those making such declarations and doing such acts, and against those, also, who were associated with them in a common design to effect the death of Marshall. Such evidence, however, would not be admissible except on that ground. Usually, a *prima facie* case as to such conspiracy must be first made out, before the declarations or acts of the co-conspirators are admissible against one another. But the practice also prevails both in England and this country, to admit general evidence of a conspiracy to effect an unlawful act, as preliminary to the proof that the defendants were guilty participants therein. 3 Greenl. Ev., § 92. Such evidence will, in most instances from the very nature of the case, be circumstantial, and, therefore, evidence of an infinite variety of circumstances, trivial and unimportant in and of themselves, when singly considered, may be received to establish with more or less directness, the formation and object of the guilty purpose. But if such general evidence of conspiracy be first introduced, without taking the usual preliminary step of showing the defendants guilty participants therein, and it should manifestly appear insufficient to affect the defendants, it would be the plain duty of the court to stop the cause *in limine*. 3 Greenl. Ev., Ib.

It is far from clear to my mind that any combination or conspiracy was formed between the defendants and Hale to kill Marshall; no old feud grudge or quarrel appears to have existed between the parties; Marshall rode with them in a perfectly friendly manner for two and a half miles, within an hour before he was shot, and was evidently without the slightest apprehension, as shown by his expression to Mary Heilig when going out to meet the party of young men in front of Heilig's house. On the contrary, his sad death seems to have been the result of a sudden quarrel

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with Hale, assisted, it may be, by the defendants, and the fact that the evidence tended to show that one of the defendants had purchased a box of cartridges for his pistol, in his possession that day, and that balls corresponding to the size of that pistol were found in the body of the deceased, and that balls apparently corresponding to the size of the pistol carried by Hale, were also found in the body, might well go to the jury along with kindred facts as tending to establish the guilt of the defendants, whether there was any conspiracy to effect Marshall's death established or not.

Of course, if there was a conspiracy between Hale and the defendants to kill Marshall, and it was effected by them, this would, being deliberately and premeditatedly done, be murder in the first degree. But inasmuch as defendants have, by the verdict of the jury, been acquitted of that crime, and as on the return of this cause to the circuit court, they can be tried for no higher grade of murder than that of which they stand convicted, it of necessity follows that any evidence of a conspiracy on the part of defendants to kill Marshall, cannot then be received; for this would be to ignore the salient feature of murder in the second degree, that it possesses no element of premeditation or deliberation; that it stands on the same footing in this regard as manslaughter at common law; both offenses being considered in law sudden and unpremeditated. 3 Greenl. Ev., § 43. But notwithstanding no conspiracy to effect the death of Marshall can be shown against these defendants on a second trial of this cause, yet evidence tending to show a conspiracy to effect his great bodily harm may well be admitted against them; and if, in the endeavor to effect such unlawful design, they accomplished his death, they would be guilty of murder in the first degree. This point was thus ruled in the *State v. Jennings*, 18 Mo. 435. Inasmuch, however, as they stand forever acquit of that higher grade of offense, they cannot be convicted of more than murder in the second degree, even if



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the jury find that they, in the accomplishment of the unlawful design of inflicting great bodily harm, effected the death of the deceased.

III. We think the instruction asked by the defendants in reference to good character, or a similar instruction, should have been given; they had abundantly established a good character as peaceable, law-abiding citizens anterior to the commission of the offense with which they are charged; and evidence of facts and evidence of character rest on the same basis; and no legitimate distinction can be taken between them. The object of the introduction of evidence respecting good character, is the improbability that a person of good character would have committed the offense alleged against him, and to lay such evidence before them with the purpose of inducing belief that either mistake or misrepresentation has occurred on the part of the prosecution. 3 Greenl. Ev., § 25, and cases cited; *State v. Alexander*, 66 Mo. 148.

IV. The case of the *State v. Miller*, 67 Mo. 604, is conclusive of the point as to the admissibility of Archer's testimony in contradiction of the witness Curry, the statement of whose testimony was received under the provisions of the act of 1875. But, though Archer was properly permitted under that act to swear that Curry had made a statement contradictory of the one accepted as the one he would make if he had been present at the trial, yet the jury ought to have been far more explicitly told than they were that such testimony could only be received for the sole purpose of impeaching Curry's statement, and could, under no circumstances, be received as evidence against the accused. The statutory method of impeaching the testimony of an absent witness is sometimes very harsh in its practical operation, and should in consequence, be very sedulously guarded by the trial courts. The statement made in behalf of the absent witness, Curry, was similar to the testimony of the other witnesses, Davis and Pearson. None of the witnesses had testified that Thomas Swain had



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a revolver in his hand, and going up to Marshall and Hale when they were clinched and going up the road; but Archer, in order to impeach Curry's expected statement, was allowed to testify that Curry had made a statement to him to that effect.

The jury should have been very pointedly told that the testimony of Archer, so far as being evidence against the defendants, was to be entirely excluded from their consideration; that its only purpose was to impeach the statement of Curry, and could have no other effect whatsoever. The instruction asked by defendants on this point was altogether unobjectionable, and should have been given. It is by no means improbable that Archer's testimony had no little weight in turning the scale against the accused; and this illustrates, in a very forcible manner, the extreme danger of overthrowing, by legislative innovations, well established rules of evidence.

V. Relative to the testimony of defendants themselves, we do not think that the instruction asked for them on that point should have been given. But we do think that the jury should have been told that a defendant, testifying in his own behalf in a criminal case, has as much credibility attached to his testimony as if testifying in a similar manner in a civil one. 2 Wag. Stat., § 1, p. 1372; Laws 1877, p. 356, § 1.

VI. We see no good reason why the usual formula as to a reasonable doubt should have been changed by receiving the addition of the word "captious." It is better to adhere to well settled instructions than to attempt new departures and experiments in criminal procedure. The judgment is reversed and the cause remanded. All concur except HENRY, J., not sitting, and NAPTON, J., dissenting.

REVERSED.

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Baile v. The Equitable Fire Insurance Company.

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BAILE V. THE EQUITABLE FIRE INSURANCE COMPANY OF  
NASHVILLE, *Plaintiff in Error.*

**Insurance:** SERVICE OF PROCESS ON FOREIGN COMPANIES. The fourth section of the act of March 23rd. 1874, providing the mode of serving legal process on foreign insurance companies, (Sess. Acts 1874, p. 74,) operated a repeal of section 25, page 770, Wagner's Statutes, and where such a company has complied with that act by appointing a competent person its attorney for the purpose of receiving service in this State, service can lawfully be made only upon him. Delivery of the writ to a local agent at his place of business will not answer.

*Error to Johnson Circuit Court.*—HON. F. P. WRIGHT,  
Judge.

*Gage & Ladd* for plaintiff in error.

*Crittenden & Cockrell* for defendant in error.

NORTON, J.—This is a suit brought by Baile and Ride-nour, the defendants in error, against the insurance company on a policy of insurance issued by the latter. The petition in the case was filed on the 9th day of December, 1874, and on the same day a summons was issued to the sheriff of Johnson county, who served the same by delivering a copy thereof to one E. H. Shotwell, the company's local agent in the town of Warrensburg, in Johnson county. It is claimed that this copy was delivered to the agent in a store where the agent had a desk for the transaction of his insurance and tax collecting business, the store itself being in the possession of other parties. For the purpose of such service it is claimed that this was the office of the company. The return of the sheriff states that the copy was served at the office of Shotwell, the agent.

The defendant was a foreign insurance company and had complied with the provisions of section four of the act of March 23rd, 1874, by appointing John D. Anderson, a competent person, its attorney for the purpose of receiving service of process in this State. The circuit court held

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that a service under the general corporation law of the State governing domestic corporations, was valid as against this foreign corporation, and that the service in this case was such service. This action of the court is assigned for error, and the only question is, whether the facts of the case warranted such action.

It appears from the record that it was admitted on the trial that defendant was a foreign corporation, having its chief office in the city of Nashville, in the State of Tennessee, and that John D. Anderson was, at the time of the service of the summons, and had more than four months, been the duly appointed attorney of defendant in this State, under the provisions of section four of the act of 1874, p. 74. It was also admitted that Shotwell, upon whom service was had, was at the time defendant's local agent in Warrensburg, and there was evidence showing that Shotwell kept the books and papers of the insurance company along with other books and papers of his own in a desk which he had in a store kept by Dunton & Farr, in Warrensburg, and that the service was made in that store. The facts thus admitted raised the question as to whether the service of summons on Shotwell was sufficient to give the court jurisdiction of defendant.

In the case of *Middough v. The St. Joseph & Denver City R. R. Co.*, 51 Mo. 520, this precise point was before the court, and it was there said "that the action was brought against the defendant, a foreign corporation, incorporated by the laws of Kansas, and it was not alleged, nor was it any where shown or pretended, that it had its chief office or place of business in this State. The construction placed on our statute has been uniform. If the chief office or place of business is in this State as designated by the statute, then the foreign company becomes domesticated and is amenable to the jurisdiction of our courts by the common process of summons. When, however, its office or place of business is not here, then it must be proceeded against by attachment as a non-resident." That case is decisive

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of this as to the insufficiency of the service on Shotwell under the provisions of Wag. Stat., sec. 26, p. 294. It is, however, claimed that the service is good under the provisions of Wag. Stat., sec. 25, p. 770. This position is not maintainable, because said section 25 is superseded by section 4 of the acts of 1874, page 74, which latter section takes the place of, and is expressly substituted for section 25, *supra*.

The defendant not having been served with summons according to law, the court erred in refusing the instruction asked by defendant to the effect that the service of summons on Shotwell conferred no jurisdiction over defendant, and for this error the judgment will be reversed and the cause remanded, in which the other judges concur.

REVERSED.

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BARNUM V. BOBB *et al.*, Appellants.

**Equity:** INJUNCTION: MORTGAGE: MARRIED WOMAN. Plaintiff being the owner of certain real estate which was subject to a mortgage, sold the same, the purchasers assuming the mortgage, paying partly in cash and partly in a note which was paid at maturity, and giving besides, their note for \$2,600, secured by a deed of trust on the land. The purchasers failing to pay off the mortgage debt, plaintiff was compelled to pay part of it. Subsequently defendants, who were husband and wife, being desirous of becoming the owners of the mortgage, but knowing that the holder, through friendship for the plaintiff, would not sell it without the plaintiff's consent, sought plaintiff's consent and assistance in effecting the purchase. Plaintiff would consent only on condition that defendants should refund to him what he had paid on the mortgage, should indorse the \$2,600 note which was still unpaid, and should waive the priority of the mortgage and hold it secondary to the deed of trust. In the absence of the wife, the husband agreed to these terms, paid the plaintiff the whole amount of the mortgage and took possession of it, and also took the \$2,600 note to his wife for her indorsement. She refused, and the note was returned to the plaintiff. Defendants sub-

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sequently caused a sale to be made under the mortgage, at which the wife became the purchaser. This action being brought to enjoin the delivery of a deed to her, and for other relief; *Held*, that plaintiff was entitled to the injunction and to a decree declaring the mortgage secondary to the deed of trust. The fact that the wife did not consent to the arrangement, as made by her husband, was immaterial, since it was by virtue of it that they had obtained possession of the mortgage, and it would operate a fraud on the plaintiff not to enforce it against her. For the same reason it was not material that she had not separate estate.

*Appeal from Montgomery Circuit Court.*—HON. G. PORTER, Judge.

This was a suit brought by Robert C. Barnum, as guardian and curator of his minor children, Fannie C. and Lucy D. Barnum, against Charles Bobb and Martha E. Bobb, his wife, and A. H. White, the object of which was to enjoin White from delivering to Mrs. Bobb a deed for certain lands in the petition mentioned, sold by him under a deed of trust, and to have a certain note for \$2,600, secured by a second deed of trust, decreed to be a first lien upon said lands.

The bill charged in substance, that in the month of October, 1868, the said minors were the owners of certain real estate, (describing it,) containing in all about 800 acres; that all of said land was held by them under and subject to a deed of trust, dated June 5th, 1862, made by Robert C. Barnum and wife, and Theron Barnum and wife to James Merry, trustee for Mrs. C. M. Merry, to secure the payment of a principal note of \$5,000, due in three years from date, and certain interest notes signed by said Robert C. and indorsed by Theron Barnum; that all said interest notes and all interest on said \$5,000 was paid up to about November 1st, 1868, when there remained due and unpaid only the said \$5,000 note; that on November 30th, 1868, the plaintiff, Robert C. Barnum, in his said capacity as curator of said minors, duly authorized thereto by the proper court, sold and conveyed by deed executed

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by himself and Theron Barnum, 560 acres of said land, (describing it,) for the sum of \$11,200, to George L. Bobb and Frank R. McGinness, son and son-in-law of defendants Charles and Martha E. Bobb; that said land was to be paid for by said George L. Bobb and McGinness by \$600 in cash, their note for \$3,000, payable in eighteen months after date, indorsed by defendants, Charles and Martha E. Bobb, their note for \$2,600, payable fifty-four months after date, both of said notes to be secured by their deed of trust upon the land purchased, and they were also to pay and take up the note for \$5,000 due Mrs. Merry; that the said McGinness and George L. Bobb paid the \$600 in cash, gave their note for \$3,000, indorsed as agreed, (which was afterwards paid,) and also gave their note for \$2,600, and secured the said two notes by deed of trust upon said land; that the said note for \$2,600 was never paid, nor was any of the interest thereon. It is further charged that said McGinness and George L. Bobb did not pay the \$5,000 note due Mrs. Merry as they agreed to, but that said Merry called upon plaintiff, and he was compelled to, and did, on the 26th day of June, 1869, pay, as curator of said minors, to the said Merry, \$2,500 on said note, and all interest up to that date, which was indorsed on the back of said note; that the payment so made, was made out of the funds of said minors, and was so paid because the title of said minors was subject to said deed of trust; that in the summer of 1869, defendants, Charles and Martha E. Bobb, called upon the plaintiff, Robert C. Barnum, and wanted to purchase the \$5,000 Merry note, knowing that Mrs. Merry was a friend of plaintiff, and would not sell said note without the knowledge and consent of plaintiff; that plaintiff refused to consent to the sale of said Merry note to said defendant, except upon the condition that they would pay down in cash at least \$5,000, and also upon the further condition, that said Charles and Martha E. Bobb should indorse with their names the said note of \$2,600, and should also stipulate and agree that the deed of trust given by



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McGinness and George L. Bobb to secure the payment of said \$2,600 note, should take precedence of and be considered and allowed as prior to the deed of trust, securing the Merry note, when said note and deed of trust should come into the hands of defendants; that these terms were consented to by defendants, and upon these and none other the plaintiff consented that they might have the Merry note; that in pursuance of this agreement, the plaintiff wrote to Mrs. Merry, in Iowa, for the note, but before the transaction was completed, he was compelled to leave the city, and placed the matter in the hands of his attorney, Musser, with instructions to draw up the necessary papers; that defendant, Charles Bobb, in company with Theron Barnum, on the 26th day of August, 1868, went to said Musser's office and there talked over the terms of the purchase, and thereupon, the said Musser drew up a paper specifying and setting forth the substance of said agreement, which paper was then signed by the parties present and attached to the Merry note, as showing the conditions of the transfer of said note to defendants, and was attached to said note when the same was delivered to said Charles Bobb, and that said Charles Bobb, also, then and there, promised that if the said \$2,600 note was given to him he would indorse it and have his wife indorse it; that said Charles Bobb paid the \$5,000, and the said Merry note and deed of trust, with said paper attached, were delivered to him; that defendant, Charles Bobb, returned the \$2,600 note not indorsed by himself or wife, and they have refused to pay or indorse the same.

It is further charged, that the defendants obtained possession of the Merry note and deed of trust under the false and fraudulent pretense that they *would* indorse said \$2,600 note, and sign and keep the said paper and agreement attached to it; that they did this to cheat plaintiff by secretly foreclosing the Merry deed of trust and thereby rendering the deed of trust given by George L. Bobb and McGinness to secure the \$2,600 note of no effect or value,

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and thus to cheat plaintiffs out of their just rights and securities; that for two years prior to the filing of the petition, the plaintiff had lived in New York, and that defendants threatening to foreclose the \$5,000 deed of trust, he had placed the matter in the hands of Mr. O. S. Baker, and that between the 18th day of May, 1873, and the 15th day of June, 1873, said Baker was absent from the State; that during his absence the defendants had defendant White appointed to execute said deed of trust, and without plaintiff's knowledge or consent, had said property advertised and sold under said Merry deed of trust about the 26th day of June, 1873, as provided therein, and that at said sale the defendant, Martha E. Bobb, purchased the same, and was demanding a deed from defendant, White. Defendants answered. There was a trial and a decree for the plaintiff, from which defendants appealed.

*Chandler & Young* for appellants.

*D. T. Jewett* for respondent.

NAPTON, J.—The only question in this case is, whether the decree of the circuit court was authorized by the facts as found by the judge. It is obvious that the court found the facts to be substantially as stated in the petition, and as such a conclusion is supported by the testimony of five witnesses, and scarcely contradicted by the defendants, we may assume them to have been correctly stated.

It appears, then, that the children of Robert C. Barnum were the owners of a farm in Montgomery county subject to a mortgage of \$5,000 in favor of Mrs. Merry, and by authority of the circuit court of said county, this land was sold to a son and son-in-law of the defendants for \$11,200. The terms of the sale were that the purchasers should pay down \$600 in cash, should take up the Merry note for \$5,000, should give their note for \$3,000, indorsed by the defendants, Bobb and his wife, and another note for \$2,600 secured by a deed of trust on the land. The \$600

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cash payment was made, the note for \$3,000, indorsed by defendants, was also made and paid at maturity, and the note for \$2,600 was made, but the \$5,000 note to Mrs. Merry was allowed to go unpaid, both principal and interest, and so, also, the note for \$2,600.

About a year after this transaction, in June, 1869, Mrs. Merry called upon the plaintiff, or his father, Theron Barnum, to pay \$2,500 on the note to her, and said Barnum paid it by discounting the \$3,000 note which belonged to the minors. In the summer of the same year (1869) the defendants wished to get possession of the Merry note and deed of trust, and according to the testimony of Mr. Musser, who was acting at that time as plaintiff's attorney, the following agreement was concluded: "The agreement was, that defendants, Bobb, were to pay \$5,000 in money and accrued interest and indorse the \$2,600 note, and hold the \$5,000 deed of trust secondary to the \$2,600 note, otherwise that it should not be negotiated or foreclosed until the \$2,600 note was paid or satisfaction secured. Witness delivered the \$2,600 note to Charles Bobb, and he said he would take it to his wife and have her indorse it. Upon Bobb's giving \$5,000, I gave him the \$5,000 note, with the paper or memorandum embodying the substance of the agreement. Bobb returned the \$2,600 note, saying his wife refused to indorse it. The defendants, Bobb, wanted to purchase the \$5,000 note and not pay it, in order to save themselves for money advanced for George L. Bobb and McGinness. I suppose Robert C. Barnum owed \$5,000 and interest on this note. Theron Barnum held the note and, I suppose, owned it. Robert C. Barnum was willing to let defendants have the \$5,000 note if they would indorse the \$2,600 note."

This statement of Mr. Musser is corroborated by Mr. Ellerbe, who was present in the office when the agreement was made. The same statement, in substance, is made by Theron Barnum and Freeman Barnum and by the plaintiff. These statements were denied by the defendants. Subse-

quently the defendant, not being able to procure a sale of the land under the deed of trust by the original trustee, had one White appointed trustee, and a sale made at which Mrs. Bobb became the purchaser. It was for the purpose of preventing White from making a deed and declaring this sale void that this suit was instituted. The court rendered a decree for the plaintiff, adjudging the sale made by defendant, White, to be void, enjoining him from making or delivering a deed to defendant, Martha E. Bobb, restraining defendant, Bobb, from advertising or selling under said deed of trust, and declaring the deed of trust securing the \$2,600 note to be a first lien on said property.

We do not very well see how the circuit court could have reached any other conclusion in regard to the facts than the one adopted. The fact that the terms of the transfer of the \$5,000 note and deed of trust were reduced to writing by Mr. Musser, and the paper appended by him to the \$5,000 note and deed of trust, and handed over to defendants, seems conclusive that Mr. Musser's recollection of the details could not have been much at fault, or the defendant would have produced this memorandum. They had it in their power to show exactly what the agreement, or proposed agreement of the plaintiff was. It may be that Mrs. Bobb, as she states, was under the impression that she never assented to an indorsement of the \$2,600 note. It seems, however, reasonably certain that the plaintiff did so understand it, and never consented to part with the note and deed of trust for \$5,000 unless upon having the \$2,600 note secured or paid. It will be seen then that the object of the petition is not to enforce the specific performance of a contract, either against Mrs. Bobb or any one else. It is not material that Mrs. Bobb misunderstood the proposition of the plaintiff, or his agent, if in fact, as she states in her testimony, she did not agree to indorse the \$2,600 note. It is certain that the possession of the \$5,000 note and deed of trust was obtained by permitting the plaintiff's agent to feel assured that such prom-

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ises were made and would be complied with. The only object of the petition and the decree which was made in conformity to its prayer, was to prevent the defendants from making use of the oldest lien upon the land, so as to destroy or very much impair the value of the note for \$2,600 for a portion of the purchase money, contrary to what must be conceded as the intention of the plaintiff, and the only ground upon which he consented to the transfer.

The evidence on the side of plaintiff is overwhelming, and is supported by witnesses who had no motives to misrepresent. It is objected to the decree that it is not proved that Mrs. Bobb had a separate estate, but the whole history of the transaction can only be accounted for on the hypothesis that she had, and whether she had a separate estate or not, her coverture will not be allowed to operate as a sword instead of a shield, and enable her to perpetrate what, at all events and in any view of the testimony, operated as a fraud upon the plaintiff. *Pratt v. Eaton*, 65 Mo. 157. The judgment of the circuit court will be affirmed. all concur. AFFIRMED.

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MEYER V. CHAMBERS, *Appellant*.

1. **Variance:** AFFIDAVIT. The fact that a defendant was misled by a variance between the petition and the evidence, can only be shown by affidavit. 2 Wag. Stat., sec 1, p. 1033.
2. **Account:** PRACTICE. Though the statute forbids the introduction of any evidence respecting an account unless the same be set forth in the pleading, or a copy thereof be attached, yet if the statute be substantially complied with, any lack of particularity will be cured if the adversary fail to move to have the pleading made more definite and certain.

*Appeal from Jackson Special Law and Equity Court.*—Hox.  
R. E. COWAN, Judge.

SHERWOOD, C. J.—Action by mechanic on an account for work done on house and materials furnished therefor. Defendant denied in her answer the allegations of the petition, and also alleged that plaintiff had contracted to do

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the work for a much less sum, and that he was fully paid such sum, &c. On trial had plaintiff had judgment, which defendant seeks to reverse.

I. If there was any variance between the allegations of the petition and the evidence offered in their support, and the defendant was thereby misled, she should, under the statute, 2 Wag. Stat., § 1, p. 1033, have set forth in what respect she was misled, such affidavit is the *only statutory test* of that fact. *Fischer v. Max*, 49 Mo. 404; *Turner v. Railroad*, 51 Mo. 501; *Clements v. Maloney*, 55 Mo. 352; *Wells v. Sharp*, 57 Mo. 56; *Ely v. Porter*, 58 Mo. 158. As the affidavit of defendant was not filed, we are warranted in concluding she was not misled.

II. It is true the statute requires that the items of account be either set forth in the pleading or a copy of such account be attached to the petition, 2 Wag. Stat., § 38, p. 1020, or else that no evidence can be given respecting such items, but this statute was substantially complied with in the case before us; and if those items were not set forth with sufficient particularity, the defendant could have moved that the petition be made more definite and certain. 2 Wag. Stat., § 20, p. 1018.

Viewing the matter in this light, we discover no error in the record, and affirm the judgment. All concur.

AFFIRMED.

VANSICKLE *et al.*, Appellants, v. BROWN.

1. **Malicious Prosecution:** EVIDENCE: CONDUCT OF ARRESTING OFFICER. In an action for malicious prosecution, evidence that the officer who arrested plaintiff, in making the arrest, conducted himself in an uncivil and insulting manner, is not admissible against the defendant, unless accompanied by evidence that his conduct was instigated by the defendant.
2. ———: ———: RES JUDICATA. In an action for malicious prosecution



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tion instituted by husband and wife against the defendant for causing the arrest and prosecution of the wife on a charge of obstructing the highway, a judgment in favor of the husband against the defendant in an action of trespass, is not admissible in evidence on the part of the plaintiffs, where it does not appear from the record, or otherwise, that the existence of the highway was involved in that suit, or where it does appear that the action was begun and judgment was rendered after the institution of the criminal proceedings. The question of probable cause is to be determined by the circumstances existing when the prosecution is begun.

3. — : — : ORDER FOR OPENING HIGHWAY. In the foregoing action it appeared that the county court had made an order directing the opening of the highway in question through plaintiff's premises, and had subsequently made another order for the opening of a highway through the same premises, and that defendant was proceeding under the first order when plaintiff's wife made the obstruction for which defendant caused her arrest. The second order having been offered in evidence to show that defendant had no right to open the road under the first; *Held*, that it was properly excluded, because it did not purport to vacate any established road.
4. — : — : VERBAL ORDERS OF COUNTY COURT. In the foregoing action it appeared that defendant, who was a road overseer, had applied to the county court for orders touching the opening of the highway in question, and had received verbal instructions to proceed with the opening under the old order. *Held*, that evidence of these facts was properly admitted, not for the purpose of showing the legality of the road, for verbal orders of the county court have no validity in law, but for the purpose of showing that defendant acted in good faith and without malice.
5. — : EVIDENCE OF GOOD FAITH. In an action for malicious prosecution, the defendant will be allowed to testify that he acted in good faith, and had no ill-feelings against plaintiff. A party to a suit may always testify as to the intention with which he did an act, when it is material to the issues to determine what the intention was.
6. — : GIST OF THE ACTION. In an action for malicious prosecution, the questions to be tried are: did the defendant, when he instituted the prosecution, believe the plaintiff was guilty, and if so, did he have reasonable grounds for so believing; overruling *Hickman v. Griffin*, 6 Mo. 37. *NAPTON, J.*, dissenting.
7. **Hill v. Palm, 38 Mo. 13, re-affirmed.**
8. — : EVIDENCE: WAIVER OF PRELIMINARY EXAMINATION. If a person charged with crime voluntarily waives a preliminary examination and enters into a recognizance to appear at the next term of court, he will be taken to have confessed that there was probable

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cause for the charge; proof of these facts constitutes *prima facie* evidence of probable cause. HENRY, J., dissenting.

9. — : MALICE: PROBABLE CAUSE. An action for malicious prosecution cannot be sustained without showing malice on the part of the prosecutor. Want of probable cause alone is not sufficient. Malice is not an inference of law from want of probable cause. *Sharpe v. Johnston*, 59 Mo. 557.

*Appeal from Knox Circuit Court.*

*Hollister & Hollister* for appellants.

1. Plaintiffs' eighth instruction ought to have been given. *Hickman v. Griffin*, 6 Mo. 37.

2. Defendant's first instruction is not the law. It requires the plaintiff to prove that the charge was willfully made by the defendant, and also that the charge was false, and in addition to all that, plaintiff must prove that the defendant was instigated by malice toward the plaintiff in making the charge, and in addition to that, that the charge was made without any reasonable or probable cause, and unless all of these facts be proved to exist to the satisfaction of the jury, they are told to find for the defendant.

3. Instruction two, given on the part of the defendant, is not the law. The voluntary waiving of an examination by a party when arrested, is no evidence of his guilt, and at the very most, if any evidence whatever, it would only be a slight circumstance to show probable cause. But by that act the defendant enters no plea of guilty, acknowledges the commission of no crime, but simply enters into a bond for his appearance to answer the charge.

4. Defendant's third instruction is based upon the evidence as to what the county court verbally told defendant in regard to this road. It tells the jury, in substance, that if the county court, while in session, told the defendant that the road in question was a legal road, then the defendant had a right to open it, and the plaintiff had no right to close it up. We apprehend that if the county

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court had even made an order and entered it of record, declaring said road legally established, yet if the petition for said road was not signed by twelve householders of the township in which said road was to be located, and three of them of the immediate neighborhood, the county court would have no jurisdiction even to locate said road or establish the same, and this petition did not comply with the law in that respect. 54 Mo. 234. The verbal orders and directions given by the county court as to defendant's duty in opening said road, were not admissible, as the action of the court is only known by its records.

5. The complaint of William Vansickle against Hugh Brown, the record, judgment and verdict of the jury, tended to prove knowledge on the part of the defendant of the illegality of said road. At the same term of court when defendant procured the indictment to be found against the plaintiff for obstructing a public highway, the defendant was tried and convicted for trespass in opening the same road under the same order, and the court, we think, should have admitted the evidence for the reasons stated in the bill of exceptions.

6. The question asked the defendant by his attorneys, viz: "Did you act in good faith towards the plaintiff in making the affidavit for her arrest?" was asking the witness to state a conclusion of fact, and should not have been permitted. That was a question for the jury to determine. That was the main fact in issue which the jury were to determine from all the circumstances in the evidence.

*Wilson & Coover with W. R. McQuoid for respondent.*

1. Plaintiff's eighth instruction was properly refused. Bigelow's Lead. Cases on Torts, 198; *Munns v. Dupont*, 3 Wash. C. C 31; 2 Greenl. Ev., § 454; *Merkle v. Ottemeyer*, 50 Mo. 49; *Hill v. Palm*, 38 Mo. 13.

2. The plaintiff was bound to show by the evidence that the prosecution against her was instigated by malice and without probable cause. She was required before she

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could recover to establish by competent evidence, the concurrence of both malice and the want of probable cause. Defendant's first instruction was, therefore, properly given. Greenl. Ev., § 453; *Casperson v. Sproule*, 39 Mo. 39; *Friswell v. Relfe*, 9 Mo. 859; *Merkle v. Otteusmeyer*, 50 Mo. 49; *Sharpe v. Johnston*, 59 Mo. 557; *Sappington v. Watson*, 50 Mo. 83.

3. The waiver of an examination and voluntary entering into a recognizance to appear and answer the charge in the circuit court was certainly evidence of probable cause. See *Sappington v. Watson*, 50 Mo. 83; *State v. Railey*, 35 Mo. 168.

4. The third instruction given for the defendant was predicated on the evidence admitted to rebut malice and to show the good faith of the defendant in opening the road and in prosecuting plaintiff for its obstruction. The evidence conclusively shows that Brown, as road overseer of his district, was honestly inquiring as to the legal existence of the road, and knowing the county court had exclusive jurisdiction of roads, he very reasonably applied to it for the desired information. The court informed him that the road was lawfully established, that the order he then had was sufficient authority to open the road, and directed him to proceed and open it. For these purposes the evidence was proper, and it is immaterial whether the directions of the court were verbal or of record, and if the evidence was admissible the instruction was proper. If there was no malice the plaintiffs had no cause of action.

5. The evidence offered by appellant to show bad treatment by the officer in making the arrest, was not admissible. The State was the plaintiff, and the officer in the execution of the warrant, was in no sense the agent of the respondent. If he was guilty of cruelty he was answerable for his bad conduct. This is not an action in trespass.

6. The proceedings in the case of *William Vansickle v. Brown*, were not admissible. The action was commenced

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after the arrest of the plaintiff, and, therefore, could not be evidence of bad faith, malice or want of probable cause in commencing the prosecution.

HOUGH, J.—At the instance of the defendant, the plaintiff, Susan Ann Vansickle, was arrested for obstructing a public highway in a certain road district, in Knox county, of which defendant was overseer. The plaintiff waived an examination before the justice who issued the warrant for her arrest, and voluntarily entered into a recognizance for her appearance before the circuit court, and was afterwards indicted by the grand jury for the offense for which she had been arrested. A *nolle prosequi* was subsequently entered by the prosecuting attorney, and thereupon the plaintiff instituted the present action against the defendant for malicious prosecution.

At the trial the plaintiff offered to prove that the officer conducted himself in an uncivil and insulting manner towards her when he arrested her. This testimony was excluded by the court, and properly so. For any abuse of his official authority the officer himself should be held liable. It is not intimated that the defendant was in any way connected with or responsible therefor, and the fact sought to be shown was, therefore, wholly outside the issues to be tried. If the plaintiff had offered to prove that the misconduct of the officer was instigated by the defendant, the testimony might have been admissible to show malice.

The record in the trespass suit between William Vansickle and the defendant, wherein judgment was rendered against the defendant for tearing down plaintiff's fence and cutting down his trees and destroying his corn, was properly excluded. That action was begun after the arrest of the plaintiff, and the judgment therein rendered after the finding of the indictment, and it does not appear from the record that the existence of the road in controversy was involved in that suit, nor

1. MALICIOUS PROSECUTION: evidence: conduct of arresting officer.

2. — : — : res judicata.

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was any evidence *aliunde* offered to show that it was. Besides, the question of probable cause is to be determined by the circumstances existing when the prosecution was instituted. Bigelow's Lead. Cases on Torts, 198.

The court also excluded certain proceedings of the county court had in 1871, in relation to the opening of a  
 3. —: —: new road through the premises of the plaintiff,  
 order for opening highway. Wm. Vansickle. We express no opinion as to the validity of those proceedings. It is a sufficient reason for excluding them that they did not vacate any old road. An express order of the court was necessary for that purpose. *Phelps v. P. R. R. Co.*, 51 Mo. 477; Acts 1868, p. 158, § 58.

The proceedings were, therefore, irrelevant. The road charged to have been obstructed, appears to have  
 4. —: —: been established by the county court in 1868.  
 verbal orders of county court. It appeared in evidence that before opening the road the defendant procured from Joel Sever, who was road overseer in 1868, the order which the county court gave to him to open said road, and then went to the county court while in session, in the year 1872, for advice and an order to open said road, and they told him that he had as good an order as they could give him; that the road had been legally established, and to go on and open it under the order he then had. The foregoing verbal declarations of the county court to the defendant were admitted against the objections of the plaintiff. We think they were admissible in evidence to show the good faith of the defendant, and that he acted without malice. Such statements would not, of course, be admissible to establish the acts or orders of the court, for the purpose of giving validity to acts done thereunder, for it has been repeatedly held that the proceedings of county courts can only be shown by their records. But the defendant's application to the court for directions in the premises evinced a purpose to ascertain his duty and to faithfully discharge it, and the directions received by him, though verbal, were admissible



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to explain the motives which actuated him in opening the road and in prosecuting the plaintiff for obstructing it.

The defendant, while on the stand, testified that he acted in good faith, and had no ill-feelings against the plaintiff. This was objected to as incompetent. The objection was properly overruled.

5 ———: evidence of good faith. When a party to a suit is admitted as a witness, he may testify as to the intention with which he did an act, whenever it is material to the issues to determine what such intention was. *Fisk v. Chester*, 8 Gray 506; *Thacher and wife v. Phinney*, 7 Allen 146; *Snow v. Paine*, 114 Mass. 520.

This brings us to a consideration of the instructions. The plaintiff complains of the refusal of the following

6. ———: gist of the action. instruction: "The court further instructs the jury that the real point of inquiry for the jury is, whether there was probable cause for the prosecution, and not whether the defendant had probable cause to believe the plaintiff guilty." This instruction is based upon the decision of this court in *Hickman v. Griffin*, 6 Mo. 37. But the rule there laid down has since been departed from by this court, and the case of *Mowry v. Miller*, 3 Leigh 565, upon which that decision was based, was expressly overruled by the court of appeals of Virginia in the case of *Spengler v. Davy*, 15 Gratt. 381, decided in 1859. In this latter case it was said that "Probable cause consists in the concurrence of belief of guilt with the existence of facts and circumstances sufficiently strong to warrant such belief; or, in other words, that probable cause is substantially belief of guilt founded on reasonable grounds." In *Bacon v. Towne*, 4 Cush. 239, Shaw, C. J., said: "Probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution." *James v. Phelps*, 11 Ad. & El. 483, 489. In *Barron v. Mason*, 31 Vt. 189, Redfield, C. J., in defining probable cause, said: "It is not enough to show that the case appeared sufficient to this particular party, but it must be sufficient to induce a

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sober, sensible and discreet person to act upon it, or it must fail as a justification for the proceeding upon general grounds." In *Broad v. Ham*, 5 Bing. (N. C.) 722, Tindall, C. J., held the following language: "In order to justify a defendant there must be a reasonable cause, such as would operate on the mind of a discreet man; there must, also, be a probable cause, such as would operate on the mind of a reasonable man; at all events, such as would operate on the mind of the party making the charge; otherwise, there is no probable cause for him. I cannot say that the defendant acted on probable cause if the state of facts was such as to have no effect on his mind." Erskine, J., said: "It would be a monstrous proposition that a party who did not believe the guilt of the accused should be said to have reasonable and probable cause for making the charge." Bigelow, says: "The question, in short, in these cases is, not whether there was in fact a sufficient cause for the prosecution, (for the acquittal shows that there was not,) but whether the prosecutor, as a reasonable man, believed there was. The very term 'reasonable and probable cause' necessarily implies this." Lead. Cases on Law of Torts, 198. In *Merkle v. Otteusmeyer*, 50 Mo. 49, Judge Adams said, that if the defendant had reasonable grounds to believe that the plaintiff was guilty of the offense charged, that amounted to probable cause, and justified the prosecution. In our opinion that reasonable and probable cause which will relieve a prosecutor from liability is, a belief by him in the guilt of the accused, based upon circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man. And the question is not simply whether the defendant believed that he had probable cause, nor is it alone whether there was in fact probable cause, but the question is, did the defendant believe the plaintiff was guilty, and did he have reasonable grounds for so believing. The instruction asked by the plaintiff is less favorable to her than the law as we have declared it. Besides, the law had already been

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declared by the court at her instance, substantially as she desired it.

The plaintiff farther complains of the action of the court in giving the first, second, third and fifth instructions 7. *HILL V. PALM*, 38 MO. 23, RE-AP-  
FIRMED. asked by the defendant. The first instruction is as follows: "The plaintiff charges the defendant with prosecuting her for obstructing a public road, and that such prosecuting was done by defendant willfully, falsely, maliciously and without reasonable or probable cause, therefore, the plaintiff must prove to the satisfaction of the jury that the charge was willfully made by the defendant; that the defendant was instigated by malice toward the plaintiff in making the charge, and that he made the charge without any reasonable or probable cause to believe the plaintiff was guilty, and unless all this be proved to the satisfaction of the jury, they will find for the defendant." This instruction is substantially the same as the instruction which was approved by this court in *Hill v. Palm*, 38 Mo. 23, and being accompanied in this case by other instructions which told the jury that malice might be inferred from the want of probable cause, is, in our opinion, unobjectionable.

The second instruction complained of is as follows: "If the jury believe from the evidence that the plaintiff, when arrested and taken before the justice of the peace who issued the warrants, voluntarily waived an examination and entered into a recognizance for her appearance at the next term of the circuit court thereafter, such waiver and the giving of such recognizance were evidence of probable cause, and the jury will find for the defendant unless the plaintiff prove by other evidence, to the satisfaction of the jury, that the indictment of plaintiff and her subsequent prosecution was caused by defendant willfully, falsely and maliciously, and without reasonable or probable cause." In the case of *Brant v. Higgins*, 10 Mo. 728, Judge NAPTON, speaking for the court, said: "The magistrate and the grand jury have

8. ———: evidence:  
waiver of preliminary  
examination.

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the very question of probable cause to try; the evidence on the side of the prosecution is alone examined, and the proceeding is entirely *ex parte*. Under such circumstances, the refusal of the examining tribunal to hold the accused over to trial, must necessarily be very persuasive evidence that the prosecution is groundless." On the other hand it has been held that a commitment of the plaintiff is *prima facie* evidence of probable cause; *Graham v. Noble*, 13 Serg. & R. 233; *Bacon v. Towne*, 4 Cush. 217. If the finding of the magistrate on the facts proved before him makes a *prima facie* case, surely waiving an examination and voluntarily entering into recognizance amounts to a confession by the accused that there is probable cause. *Vide, State v. Roiley*, 35 Mo. 168.

The third instruction was, in substance, that if the defendant, in his capacity as road overseer, acting under an order of court given to his predecessor, and <sup>2. — : malice : probable cause.</sup> under the verbal directions of the county court, opened the road in question, and the plaintiff obstructed the same, and the defendant, without malice, prosecuted her therefor, the jury should find for the defendant. We are wholly unable to see any objection to this instruction. Although the defendant may not have had probable cause for the prosecution of the plaintiff, still if such prosecution were not malicious plaintiff cannot recover. The instruction is awkwardly drawn, and it may be that it was the purpose of the draughtsman to recount those circumstances attending the opening of the road and the prosecution of the defendant, which might, in the opinion of the jury, prevent any inference of malice from the want of probable cause. The objection that the instruction was based on testimony which should not have been admitted, is untenable.

The fifth instruction was based upon the advice of counsel, and the only objection made to it is, that the testimony does not show that the defendant used reasonable diligence to ascertain all the facts, and because he did not

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make a full statement of all the facts known to him. There was testimony tending to show that he did, and the jury found that he did, and we cannot weigh the testimony. Instruction numbered seven, given at the request of the plaintiff, which was the converse of defendant's instruction, submitted these very questions to the jury, and the plaintiff cannot now be heard to object that they were so submitted. The case was submitted to the jury under instructions, which, taken as a whole, were exceedingly favorable to the plaintiff.

The second instruction given at her instance, is not the law. It virtually makes malice an inference of law from the want of probable cause. As to the inference of malice from want of probable cause, see *Sharpe v. Johnston*, 59 Mo. 557. We are of opinion that the judgment of the circuit court should be affirmed. SHERWOOD, C. J., and NORTON, J., concur. NAPTON, J., adheres to the decision in *Hickman v. Griffin*, and HENRY, J., is of opinion that the second instruction asked by the defendant should not have been given.

AFFIRMED.

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CITY OF KANSAS, *Appellant*, v. MUHLBACK.

1. **Intoxicating Liquors:** CITY ORDINANCE. Under a city ordinance subjecting persons, other than licensed dramshop keepers and druggists, to a fine for selling intoxicating liquors in quantities less than a quart, a single sale of a glass of liquor is sufficient to support a conviction.
2. **Appeal.** In such prosecutions the city has a right of appeal to the Supreme Court.

*Appeal from Jackson Criminal Court.*—HON. H. P. WHITE,  
Judge.

Prosecution for a violation of an ordinance of the City of Kansas entitled "An ordinance to protect dramshop

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keepers," approved July 17th, 1875, and passed under authority of the act of 1875, page 206, section 17, giving power to the city "to restrain, regulate and prohibit the selling or giving away of any intoxicating or malt liquors by any persons within the city, other than those duly licensed; to forbid and punish, the selling or giving away of intoxicating liquors to any minor or habitual drunkard." The defendant had not obtained a shop license, nor was he a druggist.

Upon the trial it was in substance testified by one Briant, that the defendant, George Muhlback, had, or was in charge of a grocery store in said city: that the witness, Briant, and another man by the name of Levy, (who went by Briant's request,) went to the defendant's place of business on a Sunday morning, and he, Briant, got two drinks of whisky, one for himself and the other for the man Levy that he brought with him; that he paid five cents each for the drinks, or ten cents for the two drinks so obtained. There is no evidence of any other sale by defendant but the one just mentioned on Sunday morning. On the cross-examination, he, Briant, testified that he did not know who owned the store that defendant was in; he did not know that defendant was owner of said store, or of any store. "I found the defendant in the store—he seemed to be in charge of it; this was on Sunday morning." The judge of the criminal court, after hearing all the evidence in the case, sustained a demurrer, or gave the following instruction: "That under the law and evidence in this case the plaintiff is not entitled to recover, and the jury must find the defendant not guilty," whereupon the court discharged the defendant. The city appealed.

*Wash Adams* for appellant.

The evidence shows that defendant was not a druggist, but was a grocery store keeper, and that he sold liquor



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in quantities less than one quart. That is sufficient; it is not necessary to offer evidence to show that defendant was not a licensed dramshop keeper. If he has a license he must produce it. *State v. Lipscomb*, 52 Mo. 32. One sale is sufficient. It is so held under the State law, which is broader in its terms than the ordinance. Wag. Stat., title Dram Shops; *State v. Cooper*, 16 Mo. 551. In *State v. Andrews*, 27 Mo. 267, the court said: "Each act of selling is a distinct offense." *State v. Small*, 31 Mo. 197.

*Chase & King* for respondent.

NORTON, J.—The record shows defendant was convicted before the city recorder of the plaintiff, for selling liquor without license, in violation of the ordinance of plaintiff, and that he appealed to the criminal court of Jackson county. On a trial before that court, without a jury, the court gave an instruction in the nature of a demurrer to the evidence, and discharged the defendant. The only question is, whether such a demurrer ought to have been sustained. Appellant claims that the court erred in giving the instruction. The court below held that a single act of sale under the ordinance was not sufficient, and in that the court erred.

The proceeding was commenced under an ordinance of the City of Kansas which subjected persons other than dramshop keepers duly licensed and druggists, to a fine of not less than \$25 for selling intoxicating liquors in any quantity less than one quart. Section 17, acts 1875, page 206, conferred full power on the city council to pass such ordinance.

The evidence adduced on the trial tended to show that defendant had sold two drinks of intoxicating liquor at one sale in said city, and as there was no evidence showing, or tending to show, that defendant was either a druggist or licensed dramshop keeper, and authorized to make such sale, error was committed by the court in sustaining

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the demurrer to the evidence and rendering judgment for defendant. *State v. Lipscomb*, 52 Mo. 32; *State v. Andrews*, 27 Mo. 267; *State v. Small*, 31 Mo. 197.

The case of the *City of Kansas v. Clark*, ante, p. 588, is decisive of the point raised as to the right of the city to appeal.

Judgment reversed and cause remanded. All concur.

REVERSED.

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THE STATE ex rel. ROBINSON V. SMITH *et al.*, Appellants.

**Administrator's Bond:** ACTION BY CREDITOR OF ESTATE. A creditor whose demand against the estate has been allowed and classified, cannot maintain an action on the bond of the administrator to recover the amount of his demand because of the failure of the administrator to sell land for the payment of debts, when required to do so by an order of the probate court.

*Appeal from Johnson Circuit Court.*—HON. F. P. WRIGHT,  
Judge.

*Elliott & Jetmore* for appellants.

Real estate is not assets. *State v. Price*, 17 Mo. 431; *State v. Modrell*, 15 Mo. 421; *State v. Collier*, 15 Mo. 293; *Kellogg v. Wilson*, 7 Cent. Law Jour. 277. The breaches alleged in the bond are a failure to sell real estate, and to make annual settlements, by neither of which was the plaintiff injured. There is, therefore, no cause of action. *Williams on Executors*, 1507, 1509; *Polk v. Farrar*, 12 Mo. 356; *Saulsbury v. Alexander*, 50 Mo. 142. The inventory did not estop the administrator to show want of title. *Wag. Stat.*, § 18, p. 86; *Cameron v. Cameron*, 15 Wis. 1; *Willoughby v. McCluer*, 2 Wend. 608. See, also, *Valle v. Bryan*, 19 Mo. 423; *Trent v. Trent*, 24 Mo. 307; *Aubuchonn c. Lory*, 23 Mo. 99; *Chambers v. Wright*, 40 Mo. 482; *Mor-*

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*ris v. Barnes*, 35 Mo. 412; *Heyneman v. Garneau*, 33 Mo. 565.

*G. W. Houts* and *S. P. Sparks* for respondent.

The defendant having taken charge of the estate of deceased, was bound to administer the whole estate according to law, and the orders of the court having jurisdiction thereof. Wag. Stat., chap. 2, art. 1 §§ 14, 18, p. 73. There not being sufficient personal estate to pay the debts of the deceased, the defendant was bound to sell the real estate, or so much thereof as was necessary to pay them. Wag. Stat., chap. 2, art. 3, § 10, p. 94. It was necessary for the defendant to make annual settlements with the probate court of such estate, in order that the court, as well as those interested in the estate, might know of its condition. Wag. Stat., chap. 2, art. 5, § 2, p. 107. See also §§ 11, 12, p. 109.

HOUGH, J.—On the 14th day of February, 1867, there was an allowance in favor of the relator for the sum of \$66 against the estate of D. W. Willoughby, deceased, of which estate the defendant had charge as public administrator of Johnson county.

It appears from the record that no money or other personal assets ever came into the hands of the defendant, but that on taking charge of said estate he paid to his predecessor in office \$1.30, that amount being due him from said estate. Two tracts of land, one lying in Newton and one in Jasper county, were inventoried and ordered to be sold, first in the year 1871, and afterwards in the year 1872, and also in 1873, but the defendant failed to sell the same, because, as he alleged, his intestate had no title thereto, and for the further reason that there were no funds belonging to the estate with which to defray the necessary expenses of making such sale. No annual settlements of said estate were made by the defendant after the year 1870,

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there being neither money nor other personal property in his hands.

The present suit was brought against the defendant and his sureties on his official bond for a breach thereof occasioned by his failure to sell the above mentioned land as ordered by the probate court, and for a failure to make his annual settlements, as required by law; and judgment was rendered for the plaintiff on the breach first named, for the amount of his allowance against the estate, together with interest.

The question presented for determination is, whether in the event of the failure of the administrator to sell land for the payment of debts when thereto required by an order of the probate court, a creditor of the estate whose demand has been allowed and classified, can, without further proof, recover of such administrator and his sureties the amount of such demand. We know of no authority which authorizes such a recovery under such circumstances. It does not appear that any assets of the estate have been wasted or lost by the misconduct of the defendant, and we are at a loss to conceive upon what principle the court gave the plaintiff judgment for the amount of his demand against the estate.

The judgment is reversed and the cause remanded. All concur.

REVERSED.

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FOSTER, *Plaintiff in Error*, v. GILLESPIE.

1. **Chattel Mortgage: PRIORITY: NOTICE.** F sold to C certain goods to be paid for partly in cash and partly in notes. To make the cash payment, the latter borrowed \$2,000 from G, it being agreed between the three that in consideration of C having one year to pay the loan, G should have the first lien upon the goods. F then delivered the goods to G, and on the same day a bill of sale, which

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was not recorded, and four notes payable three, six, nine and twelve months thereafter, were given by C to G. C afterwards, failing to pay his notes to F, gave F a chattel mortgage on the goods, which was recorded. *Held*, that the priority of F's mortgage over G's lien depended upon F's knowledge of the change in the agreement as to the time to be given by G to C on the \$2,000.

2. **This Knowledge should be Actual.** An instruction, therefore, that the bill of sale to G would have no validity as against F, unless the latter knew of the change in the terms of the credit given to C, "or had full opportunity or means of acquiring actual knowledge" of it; *Held*, error.

*Error to Jackson Circuit Court.*—HON. SAM'L L. SAWYER, Judge.

*L. C. Slavens* for plaintiff in error.

NORTON, J.—Plaintiff brought suit in the circuit court to obtain possession of the goods described in the petition. Defendant gave bond and retained the goods, and on trial, the evidence, as shown by the bill of exceptions, was as follows: About July 1st, 1872, plaintiff owned the goods in question, and agreed to sell them to Currier for \$4,500, part cash and the balance in ten notes of said Currier for \$150 each, and one for \$100, payable respectively, one, two, three, four, five, six, seven, eight, nine, ten and twelve months from date. To make out his cash payment, Currier, with the knowledge and consent of plaintiff, borrowed \$2,000 of defendant, upon the understanding and agreement between plaintiff and defendant and Currier, that defendant should have the first lien on the goods to secure his \$2,000 loaned to Currier, and that he would give Currier one year's time to pay said \$2,000. Plaintiff consented to this arrangement because Currier, by having one year to pay the \$2,000, would have a better chance to pay plaintiff his notes, maturing monthly as aforesaid, in the meantime. On July 5th, the sale of the goods by plaintiff to Currier was consummated, and plaintiff delivered to Currier the goods, and the following bill of sale, viz.:

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“ KANSAS CITY, Mo., July 5th, 1872.

“ A. G. Currier bought of John S. Foster all furniture, beds and bedding, stoves, carpets, crockery, &c., all and everything belonging to me now in ‘ State Line House,’ \$4,500, (forty-five hundred dollars,) as per invoice hereto attached.

“ Received payment.

“ JOHN S. FOSTER.”

On the same day, (July 5th,) defendant loaned said \$2,000 to Currier, who indorsed on the back of said bill of sale he had received of plaintiff a bill of sale to defendant, to secure said \$2,000, and delivered the same to defendant, which last bill of sale is as follows:

“ For value received, I hereby sell and convey to A. J. Gillespie all of the within described property, and hereby release all my right, title and interest thereunto.

“ July 5th, 1872.

“ A. G. CURRIER.

“ Attest: WM. KEPNER.”

Instead of paying the \$2,000 directly to Currier, defendant, on request of Currier, paid it to plaintiff, part in money and part by receipt for debts which plaintiff owed defendant. Neither of said bills of sale were acknowledged or recorded. Instead of defendant giving Currier one year to pay the \$2,000 loaned him, as was first agreed, he took from said Currier therefor, four notes of \$500 each, respectively payable three, six, nine and twelve months from July 5th, 1872. These notes and last bill of sale were made in the office of the “ State Line House.” Defendant never told plaintiff that he intended to take, or had taken, of Currier, said four notes for his loan, instead of giving Currier one year's time, as was first agreed, and plaintiff did not know that such change of time was contemplated or made, until October 15th, 1872, when he learned it from Currier. At the time Currier gave said four notes and bill of sale to defendant, plaintiff was in the “ State Line House,” and part of the time was in the



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room when the same was done, and might, upon inquiring, have learned of said change of time for payment of said \$2,000, but paid no attention to the matter at the time, and did not know of said change of time, but might have known if he had paid attention at the time. A few days after this defendant showed plaintiff the bill of sale he had taken from Currier.

Currier had possession of the goods from July 5th, 1872, until January, 1873, when he ran away and abandoned the goods, and the defendant came and took possession of them, having previously received \$400 in part payment of his notes. On the 6th of July, 1872, Currier executed to plaintiff his said ten promissory notes for part purchase money of said goods, none of which have ever been paid. About the 15th of October, 1872, Currier having failed to pay such of said notes as were due, plaintiff first learned from him that defendant had not given him one year's time to pay the \$2,000, as was first agreed. Plaintiff then took from Currier a chattel mortgage on said goods, to secure the payment of his said ten notes for part purchase money of said goods, which mortgage was duly acknowledged, and was recorded in the recorder's office of Jackson county, Missouri, on the 17th day of October, 1872, book 99, page 462, and was read in evidence on said trial, and is copied in the bill of exceptions in this case. Before the trial of this cause, defendant sold all the goods in controversy, which were worth \$1,300 at the time this suit was brought.

On the trial below, (which was by the court,) plaintiff asked the court to give the following declaration of law, viz.: "The plaintiff asks the court to declare the law to be, that if it appears from the evidence that the conveyance in writing of the property in dispute by A. G. Currier to defendant, was given to secure a debt from Currier to defendant, then the same is a mortgage, and that inasmuch as the same was not acknowledged and recorded, nor the possession of the property delivered to and retained by

defendant, said conveyance is absolutely void as to this plaintiff." This instruction was refused, and plaintiff excepted at the time.

The court, thereupon gave the following instruction, (which was objected to by plaintiff, and his exceptions saved,) viz.: "The plaintiff can only maintain this action by virtue of the rights acquired under the mortgage read in evidence; and if it appears from the evidence that the plaintiff, at the time he took that mortgage, had notice that said Currier had made to defendant the bill of sale of the property in controversy to secure the loan of \$2,000 by the defendant to Currier, and to secure which, it had been agreed between all the parties, including the plaintiff, that defendant should have a first lien on said goods, from said Currier, the money loaned being paid directly to plaintiff, and he crediting said Currier therewith, on account of the purchase by said Currier of the goods in controversy of the plaintiff; and that plaintiff had actual knowledge, or full opportunity or means of acquiring actual knowledge, at the time that the defendant took from said Currier, for said loan, his four notes of \$500 each, payable, respectively, in three, six, nine and twelve months, from date of July 5th, 1872, instead of giving him one year's time to pay said loan; then the plaintiff, as such mortgagee, is not entitled to the possession of said property as against the lien of defendant. And if any part of said debt of said Currier to defendant is unpaid, and the goods claimed are not of greater value than necessary to secure the unpaid balance, of his debt, the finding must be for the defendant."

The court then found for the defendant, and found that the value of the property in controversy at the beginning of the suit was \$1,300, and gave judgment in favor of the defendant.

Whether the writing signed by Currier is to be regarded either as a bill of sale or mortgage, Foster would be estopped from disputing its validity, provided it was

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taken by Gillespie as a first lien on the property in conformity with the agreement made between Gillespie, Currier and Foster. To allow him to do so would operate as a fraud upon the rights of Gillespie, and hence, we think, the instruction asked by plaintiff was properly refused. On the other hand, if taken in violation of the contract between the three parties, especially between Foster and Gillespie, that Gillespie as a condition to being entitled to a first lien on the goods, was to give Currier twelve months credit on the \$2,000 loaned him, then it could have no validity as against Foster, unless he knew of the change in the terms of credit given to Currier. The instruction given by the court, while it recognizes the above principle, is vicious in so far as it contains the words "or full opportunity or means of acquiring actual knowledge."

The evidence shows that at the time Currier gave his four notes to Gillespie, that plaintiff, though in and out of the room while the defendant and Currier were drawing the writing, had no intimation of any change, or contemplated change, in the agreement to put him on inquiry, and, therefore, had a right to suppose that the agreement was being carried out as it was made. Had he been informed that a change was intended, and then failed to have availed himself of the opportunity he had to inquire in regard to it, he would have been chargeable with notice. *Rogers v. Jones*, 8 N. H. 264.

For this error the judgment will be reversed and cause remanded, with the concurrence of the other judges.

REVERSED.

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NOELL V. GAINES, *Appellant*.

**Notes Secured by Deed of Trust:** LIABILITY OF INDORSER. A deed of trust given to secure two promissory notes, which, by their terms, matured at different dates, provided that if the maker should fail to pay the debt or interest when the same should become due according to the tenor, date and effect of the notes, then both should become due and payable, and the holder should have the right to order a sale under the deed. Plaintiff having become the holder of both notes, upon default in payment of the first, caused a sale to be made, and the proceeds of the sale not being sufficient to satisfy both notes, on the day when the second became due according to its terms, demanded payment of the maker, and, payment being refused, caused notice of dishonor to be given to defendant who had signed the note as indorser. In an action on the note, *Held*, that the demand and notice came too late; that plaintiff having elected to declare a forfeiture on failure to pay the first note, the second then became due, and in order to charge defendant demand should have been made and notice given then. HOUGH, J., dissenting.

*Appeal from Chariton Circuit Court.*—HON. G. D. BURGESS,  
Judge.

*Kinley & Wallace* for appellant.

1. The note and deed of trust were executed contemporaneously, and were dependent on each other; the deed of trust providing that the notes could be declared due for a failure to pay the annual interest. This contract governed and controlled the time for the payment of the notes. 2. If the terms of a contemporaneously executed deed of trust can prevent a note from becoming due, as provided by its terms, why cannot the deed of trust thus executed, authorize the holder of the note to declare it due, before its maturity, as expressed on its face. If he does so, should he not notify the indorser, so he can protect himself, for instance, by seeing that the security to be sold under the deed of trust brings its value, or at any rate enough to prevent any sacrifice in the sale of the land. 3. When Noell elected to declare the notes due and payable, he at once should have notified the indorser, and thus have given him

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an opportunity to have secured the balance due, if any, after the sale of the trust property. 4. Noell declaring said note due on account of failure to pay annual interest, *made the note absolutely due*, hence the necessity for the demand, notice of non-payment and protest, before the indorser could be held. *Brownlee v. Arnold*, 60 Mo. 79; *Waples v. Jones*, 62 Mo. 440. In *Whitcher v. Webb*, 44 Cal. 127, the court held that in a note containing the condition that upon a failure to pay interest quarterly, the holder of the note might declare it due, and upon such failure, the holder elected to declare such note due, as in the case at bar, that such election on the holder's part made the note absolutely due. The case at bar is similar, except the authority to declare the note due before it matures by its terms, is not found in the note, but in the contemporaneously executed deed of trust, which all the authorities agree is part of the note, and controls it, so far as to prevent its maturing at the time fixed for it to become due. 2 Parson's Cont., 553, and cases there cited. We urge that the note could not become due for one purpose, at the wish of respondent, and not become due absolutely, for all purposes.

*Charles A. Winslow* for respondent.

The record presents but one question for solution: What effect did the provisions of the trust deed have upon the maturity of the notes? In other words, did these provisions have any other and greater effect than to mature all the notes for the purpose of distributing the funds arising on the sale of the land? It is submitted with confidence that they did not, and that for all other purposes the notes matured according to their face. *Morgan v. Martien*, 32 Mo. 438; *Mason v. Barnard*, 36 Mo. 384. There is no similarity between this case and *Brownlee v. Arnold*, 60 Mo. 79. The provisions of the deed of trust in that case were peculiar and very explicit; and the strong language used furnishes the only reason justifying the application of the rule cited, to instruments of this kind. Surely, the rule

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cannot be applied generally to all deeds of trust. That case does not in the slightest degree conflict with the two cases cited above, which are precisely like the case at bar, and should control in its determination. In *Whitcher v. Webb*, 44 Cal. 127, the provision relied on was in the body of the note, and the case, therefore, is not relevant. *Waples v. Jones*, 62 Mo. 440, decides nothing in addition to *Brownlee v. Arnold*, 60 Mo. 79, and there is not the slightest conflict between these cases and *Morgan v. Martien*, 32 Mo. 438, and *Mason v. Barnard*, 36 Mo. 384. In fact, they are in perfect harmony, and together decide the law correctly. The difficulty with the appellant is, that his case falls within the latter cases, and not within those he cites. 2. Parson's Cont., 553, and the cases cited in note, simply maintain the general rule of construction, about which we make no question, and do not otherwise bear on the case at bar.

SHERWOOD, C. J.—The note in suit is as follows, to-wit:

“BRUNSWICK, Mo., February 26th, 1872.

“Three years after date, I promise to pay to the order of Henry L. Gaines, \$500, for value received, negotiable and payable, without defalcation or discount, and with interest from date at the rate of ten per cent. per annum; and if interest be not paid annually, to become as principal, and bear the same rate of interest.

(Signed)

TURGEN WILL.”

Upon which note was the following indorsement: “This note is secured by deed of trust, stamped according to law.”

The petition alleged the due presentment of the note for payment, at the late residence of the maker, on the 1st day of March, 1875, and the due notification to the indorser of non-payment. No point is made as to the form of the protest.

The cause was submitted to the court upon the follow-



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ing agreed statement of facts: It is agreed that the note sued on is one of two notes, executed by Targen Will to H. L. Gaines, which were secured by a deed of trust herewith filed and made part of this agreement, by which, on non-payment of the interest to become due annually, or of either note as it should become due, it should have the effect of making all the notes secured as aforesaid due and payable; that before the maturity of either of said notes, either by their terms or the terms of the trust deed, the notes were all, for value received, transferred and assigned by written indorsement on their backs, by H. L. Gaines to H. M. Noell; that Noell, before the actual maturity of either note, on account of default in payment of interest becoming due annually on said notes, elected to declare them due and payable, and sold the land thereunder, and that after said sale the note sued on, by its terms, became due and was duly protested, as set forth in plaintiff's petition.

The deed of trust, so far as concerns the present inquiry, is as follows: "But, should the first party fail or refuse to pay the said debt or the said interest, or any part thereof, when the same or any part thereof shall become due and payable according to the tenor, date and effect of said notes, then the whole shall become due and payable, and this deed shall remain in full force and effect, and the said party of the second part, \* \* at the request of the legal holder of the said notes, shall, or may proceed to sell," &c. John H. Townsend was the trustee. This suit is brought for the balance due on the note declared on, the sale of the property incumbered failing to realize a sufficient sum. Judgment went for plaintiff, causing this appeal.

The salient question in the case before us is, whether the proper steps were taken "to fix the indorser" thus converting his conditional liability into an absolute engagement. And the proper solution of this question depends upon the like solution of another, viz.: Whether, under

the agreed facts, the notes matured according to their face, or whether such maturity was limited and controlled by the terms of the contemporaneously executed deed of trust. It is but the statement of common learning to assert, that instruments executed at the same time and with regard to the same transaction, and making reference to each other, are but one in the eye of the law. 2 Smith's Lead. Cases, 259, *et seq.* and cases cited; 2 Pars. Cont., 553, and cases cited; 1 Greenl. Ev., § 283, and cases cited; *Washington Mut. Fire Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480. Nor is it even necessary to give this rule operation, this principle application, to make two instruments virtually one, that refer to each other in terms. 2 Smith's Lead. Cases, *Id.*

The principle followed in *Brownlee v. Arnold*, 60 Mo. 79, was but an enunciation of the familiar rule above noted. There the deed of trust executed at the same time as the notes secured thereby, provided that the notes should not become due, nor the deed be foreclosed until the fourth note should mature. The first note was, after its maturity, transferred to a third party, who, for the purpose of an ordinary recovery, brought suit thereon, and we held the action *prematurely* brought, holding that it was perfectly competent for the original parties thus to contract; that the notes and deed of trust should be "read together and regarded as one instrument," and that a purchaser with notice of the note falling, according to its face, first due, occupied no better footing than the original payee. So, also, in *Waples v. Jones*, 62 Mo. 440, pursuing the same line of decisions where notes made payable in three years were secured by deed of trust, which provided that if the interest (made payable annually) was not paid when it fell due, the whole debt should become immediately due, and the trustee might proceed to sell, it was ruled that the trustee rightfully exercised the power of sale on the occurrence of default as to the first year's interest, request being made by the holder of the notes.

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In *Stancil v. Morton*, 11 Kas. 218, the mortgage debt was payable in four years, but the mortgage contained a provision, that if the annual interest was not paid when falling due, or the taxes were not paid when the law made them payable, the whole mortgage debt should become forthwith due. It was held in an action of foreclosure, that by reason of the default in the payment of taxes, the whole debt had become due, and a number of authorities are cited in support of the conclusion reached. In *Whitcher v. Webb*, 44 Cal. 127, the notes were secured by a mortgage; the notes bore interest payable quarterly, with the additional proviso, "that if default were made in this respect, the notes should become due at the option of the holder." The mortgage also contained a clause providing for foreclosure for the entire sum, principal and interest, if the latter were not paid according to stipulation. And in that case the judgment awarding foreclosure was affirmed with damages, the court holding an appeal which sought to accomplish the reversal of such judgment "wholly without merit." Counsel for plaintiff, however, attempt to draw a distinction as to that case, by saying that there the provision relied on, was "in the body of the note." But what of that? If it be true where one instrument refers to another contemporaneously executed, relating to and forming part and parcel of the same transaction, that there both instruments become one in the eye of the law, it must incontestibly follow that it makes no sort of difference in which instrument the proviso be contained.

The case of *Morgan v. Martien*, 32 Mo. 438, is without pertinency, for there the sole question was whether the exoneration of a surety had been accomplished by means of a subsequently executed deed of trust, to which the surety was no party, containing a provision that if any of the notes were not paid in thirty days after due, all the notes should become due immediately; and it was held that the surety was not released, and Judge Bay expressly gives as the grounds for the conclusion arrived at, that the

deed was "merely collateral, and intended as an additional and further security," and it was not "intended that it should operate as an extinguishment of the original contract, or should in anywise enlarge or diminish the liability of either party to such original contract." And the subsequent remarks made in that connection, that "the notes could not, by the happening of such contingency, mature for general purposes," must be construed with reference to the point then under discussion. Construed in this way, they are obviously correct, since no one would contend that an antecedently signed note could, without the consent of the surety, be made to mature at an earlier date than that specified in the note itself.

The decisive point in *Mason v. Barnard*, 36 Mo. 384, was, that Mrs. Fithian was not a mortgagor, and consequently the judgment of foreclosure against her was void; this was amply sufficient to dispose of the case, and it is quite evident that a remark made therein, *arguendo*, to the effect that it was not intended that the note "should become due for the purpose of obtaining a judgment at law," was not very carefully weighed, as on the theory on which that case proceeds, Mrs. Fithian could not have been liable, even if such had been the intention, because she was party neither to the notes nor deed of trust, both having been made anterior to her reception of the deed for a portion of the land. That case, therefore, does not present the feature so prominent in this, of contemporaneously executed instruments making reference to, and thus becoming incorporated into each other. Besides, the learned judge who delivered the opinion of the court in that case, concurred in the subsequent one of *Brownlee v. Arnold*, and himself wrote the opinion in *Waples v. Jones*, *supra*, announcing, in all its broadness, the view above expressed.

We are not called upon to, nor do we say, what would be the effect of a purchase made of negotiable paper, secured by deed of trust, without any knowledge of a provision in such deed similar to the one under discussion. That

point may be found discussed in 2 Parsons, *supra*. But we have not the slightest hesitancy as to the correctness of the conclusion reached, that so far as concerns the plaintiff, who, it must be conceded, is a purchaser with notice, the notes and deed of trust are, to all intents and purposes, but one instrument. The holder of the notes and deed of trust, having elected to stand upon the rigid terms of the contract, it was but just to the indorser, in order to charge him, that the maker should have been, when the default as to interest occurred, called upon for the payment of the whole debt which then fell due in accordance with the express terms of that contract; and if payment was not then made by the maker, the indorser should have *then* been notified; for it cannot, with any show of reason, be urged that the notes could, under the terms of the contract, fall due for *one purpose* and not for another. If they fell due when the contingency happened, and because it happened, and because the parties upon valid consideration had thus contracted, it must needs follow that the face of the notes under the circumstances mentioned ceased to furnish any guide as to their maturity.

Again, it appears to be conceded by plaintiff's counsel that upon the occurrence of default in the payment of interest, it was competent for the holder of the notes to have the property sold under the deed of trust. If this be true, and so it was ruled in *Waples v. Jones, supra*, then under our statute, (2 Wag. Stat., § 2, p. 954,) the holder, instead of requesting the trustee to sell, could have resorted to an *ordinary judgment of foreclosure*. In such an event, if the mortgagor were summoned, what would that judgment be? Clearly that the assignee of the debt recover that debt, to be levied of the mortgaged property; and if that be insufficient, that the residue be levied of other goods, &c., of the mortgagor. 2 Wag. Stat., §§ 8, 9, p. 955. If this be admitted, the correctness of the foregoing views is made manifest; for if the notes mature for the purpose of a sale under the deed of trust, then, also, for the purpose of fore-



closure; if for the purpose of foreclosure, then for a *general* judgment and general purposes, for it is not to be supposed that a court would entertain a suit for foreclosure when *prematurely* brought. It seems difficult to answer this reasoning, or combat the force of the illustration just mentioned, nor does the illustration lose any of its force if the mortgagor be not summoned; for still the judgment must go for the whole debt, to be levied alone, however, of the mortgaged property, and we are of opinion, that it conspicuously portrays the error of the idea that the notes might fall due for the purpose of a *sale under the deed of trust, but not otherwise*. Being of this opinion, we must regard the result reached by the trial court as erroneous, and reverse the judgment. All concur except HOUGH, J., who dissents.

## REVERSED.

HOUGH, J., DISSENTING.—I dissent from the foregoing opinion, because I conceive it to be wrong in principle, injurious in its effects, and in direct conflict with the previous decisions of this court.

It is in direct conflict with the case of *Morgan v. James M. Martien*, 32 Mo. 438. In that case it appears that in May, 1857, Joseph G. Martien gave two notes to the plaintiff, Morgan, with the defendant, James M. Martien, as surety, one of which notes was due in one year, and the other in two years. For the purpose of securing said notes and others, Joseph G. Martien executed a trust deed containing the following provision: "If any one of said notes become due and remain for thirty days unpaid after due, then, by virtue of such default in the payment of any of the said notes, all the notes remaining unpaid shall, forthwith, become due and payable, as though due by the face thereof; and if said notes, or either of them, shall become due by their tenor, or the provisions of this trust, and be unpaid, then this deed shall remain in full force," &c.; and the trustees were authorized to proceed to sell. This deed,



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though bearing even dates with the notes, was acknowledged June 9th, 1857, and filed for record July 16th, 1857. Suit was brought against the surety on the second note, and he contended that the principal in the note and the payee therein had, by the execution and acceptance of the deed of trust, altered the terms of the note on which he was surety, without his knowledge or consent, and that he was thereby discharged. The sole question, therefore, before the court was, as to the effect of the trust deed upon the terms of the note, and the court held that the surety was not discharged, because the trust deed did not alter or affect the time of payment of the note. The court said: "It is manifest that the deed was merely collateral, and intended as an additional and further security. So far from affecting the rights or remedies of the surety, it inures to his benefit. The object of the provision in the deed making certain notes mature upon the contingency expressed, was to enable the trustees to sell the property upon such contingency, and apply the proceeds, or so much thereof as might be necessary, to the liquidation of all the notes whether upon their face they had matured or not. It was to insure the prompt performance of the original contract, and not to change or alter it. It was to enable the trustees to apply the proceeds of the sale to the payment of the entire debt instead of a part. The notes could not, by the happening of such contingency, mature for general purposes, and hence the plaintiff could not have brought suit upon this note prior to its maturity, as expressed on its face." The fact that the trust deed was executed after the notes were made, only makes the judgment of the court stronger and more pointed against the opinion of my associates. Of course, it was competent for the principal parties to the note to change its terms, or the time of its payment, without the consent of the surety, but in such event the surety would be discharged. The court, however, held that the surety was not discharged, because the trust deed did not alter the terms of the note.

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The opinion of my associates is also in conflict with the decision of this court in *Mason v. Joseph S. Barnard and Eliza B. Fithian*, 36 Mo. 384. Joseph S. Barnard executed five notes, one of which was payable in six months, and the remaining four in one, two, three and four years, respectively. To secure these notes, Barnard executed a deed of trust which provided that if default should be made in the payment of any one of said notes, "then all of said notes, at the option of the holder thereof, might be considered as due, and the said trustees, or either of them, might, without waiting for the maturity of any of the other notes, proceed to sell," &c. Barnard conveyed to Mrs. Fithian the land covered by the trust deed. The conveyance contained a recital that, as part of the consideration therefor, Mrs. Fithian was to pay the notes secured by the deed of trust. This conveyance was a deed-poll and not a deed *inter partes*. The notes due in two, three and four years came to the possession of the plaintiff, Mason, and default having been made in the payment of the note due in two years, he elected to consider them all due, and brought a suit of foreclosure against Barnard and Mrs. Fithian, and obtained a judgment against both for the full amount of all the notes, and for the sale of the mortgaged property. This court held that no judgment whatever could be rendered against Mrs. Fithian on the notes, and that the judgment against Barnard on the notes not due on their face, was erroneous, on the ground that the provision in the trust deed declaring that all the notes should become due in case of default, was for the sole purpose of distributing the trust fund, and not for the purpose of obtaining a judgment at law upon them.

The opinion of my associates is also in conflict with the decision of this court in the case of *Hurck et al. v. Erskine*, 45 Mo. 484. In that case three notes due respectively in one, two and three years, were secured by a deed of trust, which provided that "if said notes or interest, or any part thereof, be not well and truly paid when due, then all of

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said notes shall become forthwith due and payable, whether due on their face or not." Default was made in the payment of the first note; the property was sold by the trustee, and the question as to the distribution of the proceeds was brought before the circuit court by a bill of interpleader filed by the trustee, the notes being held by different parties. The sole question before the court was as to the time of the maturity of the notes, as this court had held in *Mitchell v. Ladew*, 36 Mo. 526, and in *Thompson v. Field*, 38 Mo. 320, that where a deed of trust secures several notes maturing at different dates, the notes shall be paid in the order in which they mature, notwithstanding they might all be due at the time the sale was made. The circuit court held that, as by the express terms of the deed of trust the notes all became due upon default in payment of the first note, they all matured at the same time, and, therefore, stood on an equality in the distribution of the fund, and it, therefore, decreed a *pro rata* distribution. Judge Wagner, in delivering the opinion of the court, said: "We do not concur in this view. A similar question arose in the case of *Mason v. Barnard*, 36 Mo. 384. There, by the terms of the deed of trust, the trustee was empowered to sell all the property when the first note fell due; and they were all to be considered, at the option of the person holding the same, to be matured upon the first default. On that occasion we said: 'The reason for such a provision is obvious. Upon a sale of the whole property, if the purchase money exceeds the amount of the first note, it would have to lie in the hands of the trustee without interest till the succeeding note matured, if no condition was made to the contrary; and the condition inserted to elect to consider them all due was for the purpose of distributing the trust fund to all when the property was sold, but for that purpose only.' When a sale has to be resorted to and the property sold on account of default in the payment of any of the notes, it is advisable and advantageous that they should all be considered due; that a

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final adjustment should be made, and the parties entitled thereto should receive their money, instead of suffering it to lie idle in the hands of the trustee."

The opinion of my associates is also in conflict with the decision of this court in the case of *Andrew F. Whelan v. Reilly et al.*, 61 Mo. 565. In that case the plaintiff had executed a note for \$2,000, due in three years, together with six interest notes for \$100 each, maturing at stated intervals during the three years. The deed of trust securing the notes provided that in case of default in the payment of any of the interest notes, the whole amount of the debt secured should become due and payable. Default was made as to two of the interest notes, and the property was advertised for sale, but before the sale all the costs and expenses incurred by the trustee, together with the amount of the two interest notes which had matured, were tendered to the trustee, which he refused to receive unless the principal note was paid. This the debtor refused to pay, and the property was sold. Upon his application the circuit court set the sale aside, and this court affirmed its judgment. Judge SHERWOOD, who delivered the opinion of this court, speaking of the oppressive conduct of the trustee in demanding payment of the whole debt, said: "He knew the amount of the costs due him, and yet, when an amount sufficient to cover them, as well as the matured interest notes is offered, his lips are sealed, except to refuse the amount offered, unless the principal note was paid. He knew also, if he knew the requirements of his position, that the default in the payment of the interest notes was cured by the sum offered him, and, therefore, that payment of the \$2,000 note should not have been demanded." The cases of *Morgan v. Martien*, 32 Mo. 438, and *Mason v. Barnard*, 36 Mo. 384, were both cited in argument, and relied upon by the counsel for Whelan, the plaintiff, and were followed by this court in that case, though they are not alluded to in the opinion. The same ruling was also made in the case of *John Whelan v. Reilly et al.*, 61 Mo. 578.

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The case of *Brownlee v. Arnold*, 60 Mo. 79, is the only case I have been able to find which gives countenance to the decision in the case at bar. In that case I expressed no opinion on the point now in issue. That case, in my opinion, was incorrectly decided, and was evidently not well considered. None of the cases in this State, bearing upon the point under discussion, were cited in argument or examined by the court. Besides, the instrument sued on in that case, and treated as a promissory note, was not a promissory note, but a simple contract only, as it stipulated for the payment of attorney's fees and reasonable traveling and other expenses incurred in collecting the same, besides waiving all relief from valuation or appraisement laws of this or any other State. The deed of trust does not appear in the record, but its legal effect, as set out in the answer and admitted by the plaintiff, and the agreement of the parties in relation thereto, might make a distinction between that case and this. The sole question in *Waples v. Jones*, 62 Mo. 440, was whether, under the terms of the trust deed, the trustee had a right to sell for the non-payment of interest, and the reference to *Brownlee v. Arnold*, was wholly unnecessary, and somewhat inexplicable, as there is not the slightest resemblance between the two cases, apart from the fact that there was a deed of trust in each. With the exception of *Brownlee v. Arnold*, I have been unable to find a single case in the books which holds that the owner of a note, secured by mortgage, is bound by the terms of the mortgage, if he knows of its existence, although he may not wish to resort to, or rely upon the mortgage security.

The argument, based upon the assumption that, in a foreclosure suit on the trust deed in question, judgment would be rendered for the whole debt, whether due by the terms of the notes or not, is a plain *petitio principii*; and, besides, is completely overthrown by the decision in *Mason v. Barnard*, *supra*, where the precise point is deliberately



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adjudged to the contrary, and this decision, as has been seen, was affirmed in *Hurck v. Erskine*, *supra*.

The rule in relation to reading several instruments together, is well stated in 2 Smith's Leading Cases, 6 Am. Ed. p. 322, in the note to the celebrated case of *Wain v. Warlters*, as follows: "Instruments executed at the same time, for the same purpose, and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together, as if they were as much one in form as they are in substance. *Church v. Brown*, 21 N. Y. 315, 330. \* \* To bring this rule into operation and render two writings virtually one, for the purpose of construction and interpretation, both need not be written at the same time, nor even refer to each other in terms. *Cross v. Norton*, 2 Atkyns 74. It is enough that both have or are designed to effect the same end or subject, and that their mutual dependence and connection appear, on comparing or reading them together, with the aid of such extrinsic evidence as may be requisite to ascertain and identify their subject matter."

An examination of the cases cited by the learned annotators in support of the foregoing rule, as well as the great mass of cases on the same subject to be found through the books, will show that this rule was never intended to be so applied as to make a negotiable promissory note and a mortgage contemporaneously or subsequently executed to secure its payment, as much one instrument, as if they were one in form. The rule relates to an entirely different class of cases. A note and mortgage do not constitute a single contract. They are separate instruments, executed for different purposes and differ in nature. The mortgage is governed by the law of real property, and the note by the law merchant. *Potter v. McDowell*, 43 Mo. 93, 98; *Linnville v. Savage*, 58 Mo. 248; *Logan v. Smith*, 62 Mo. 455. All the authorities hold that the debt, which is evidenced by the note, is the principal thing, and the mortgage, which secures it, is simply an incident thereto. This has



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been repeatedly decided by this court. *Labarge v. Chaurin*, 2 Mo. 180; *Anderson v. Baumgartner*, 27 Mo. 87; *Mitchell v. Ladew*, 36 Mo. 533; *Watson v. Hawkins*, 60 Mo. 554; *Logan v. Smith*, 62 Mo. 455. If a party relies upon a mortgage, which is nothing more than a contract under seal, of course he is bound by the terms of the contract, and can only enforce it according to its terms. But if the holder of a negotiable note, secured thereby, chooses to disregard or abandon the mortgage security; undoubtedly he may do so, and the note will then be enforced according to its terms, and the law of negotiable paper.

It has never been announced by any court, so far as my reading has extended, that a negotiable promissory note loses its negotiability when its payment is secured by mortgage. Yet, if the opinion of my associates is to obtain, that a negotiable note and a mortgage contemporaneously executed to secure it, are, in the eye of the law, but one instrument, the note will not only lose its negotiability, but it will also lose its character as a promissory note, and become, in conjunction with its complement, the mortgage, an ordinary contract merely. It is only necessary to imagine a promise to pay money, and a mortgage to secure it, united in the same instrument, signed by the party to be charged, in order to see at a glance that the legal character of such a paper is not that of a negotiable promissory note, but of a simple contract. Apart from other provisions of the mortgage, in case of default the costs and expenses of executing the trust would render the amount to be paid by the promisor uncertain, and would bring such an instrument directly within the rule laid down by this court in *First National Bank v. Gay et al.*, 63 Mo. 33.

It has been repeatedly decided that the transfer of a note secured by mortgage, entitles the indorsee to the benefit of the mortgage security, whether, at the time of the transfer, he knew of the existence of the mortgage or not. If, however, the mortgage, though recorded as provided by law, will not charge the holder of the note with notice of

its existence, and if the holder of the note is to be bound by the terms of the mortgage only when he has actual notice thereof, then, inasmuch as the negotiability of the notes will depend upon the fact of notice, we may have the singular spectacle of two negotiable promissory notes in form, complete and perfect in themselves, expressed in precisely the same language, executed at the same time, and secured by the same mortgage, one of which may be negotiable and payable according to its terms, and the other not. Nay, more, the same note which is not negotiable in the hands of one having notice of the mortgage, may be transferred to a party not having notice and again become negotiable.

But if it be possible to preserve the negotiability of notes secured as the one here sued on, in the hands of persons having notice of the mortgage, and the opinion of my associates seems to assert that it is, must the holders of second and third installment notes, who may care nothing for the mortgage security, and may prefer to rely upon their indorsers, keep themselves informed, at their peril, as to the ownership of the first note, in order to ascertain whether there has been a default, and whether the notes held by them have become due, so that they may bind their indorsers? Such a requirement will be a new and inconvenient feature in the law of negotiable paper, and the time of payment of a negotiable promissory note so secured will vary accordingly as it may fall into the hands of those who have, or have not, notice of the mortgage.

The rule in relation to reading several instruments together is inapplicable to notes and mortgages. The two instruments are distinct and separate, and full effect should be given to both, and to the obvious intention of the parties. This can only be done by following the decisions of this court which I have heretofore cited.

It is a matter of common information among the members of the bar in some sections of the State, that mortgages and deeds of trust containing provisions in relation

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to the maturity of installment notes similar to those contained in the deed of trust in the case at bar, have been in use in this State certainly since the year 1847. And they were brought into general use in consequence of the litigation which terminated in the decision of this court in *Kennedy's Admr. v. Hammond and Hall*, 16 Mo. 341. The object of such provisions was to enable the trustee to distribute the proceeds of the sale of the mortgaged property in all cases, as a court of equity always does when the mortgaged property is not susceptible of division and the whole must be sold, though a part only of the debt secured is due. In *Salmon v. Claggett*, 3 Bland Ch. 179, the chancellor said: "Where a debt, secured by mortgage, is made payable by installments, it is well settled that the mortgage becomes forfeited by the non-payment of the first installment, and may be foreclosed immediately after that time. If a bill be filed for that purpose, the debtor may, however, prevent a foreclosure or sale, by paying the installment then due, but if he fails to do so, then the mortgage may be entirely foreclosed, or so much of the property may be sold as will satisfy the sum due at that time; and the decree will be allowed to stand as a security for the other installments as they become due—as in case of a judgment at law for an annuity. But if the mortgaged property cannot be conveniently or safely sold in parcels, then it must be disposed of entire, and the whole debt raised and paid, with a rebate of interest on sums not due at the time of paying over the proceeds of the sale to the creditor. This is done from necessity, and as an unavoidable consequence of the peculiar nature of the case." See also *Mussina v. Bartlett*, 8 Porter 284, and *Baker v. Lehman*, 1 Wright 524.

There is, therefore, nothing harsh or rigorous in the provisions of the trust deed under consideration. They are really in the interest and for the benefit of the mortgagor as well as the creditor, as they require the proceeds of the sale to be applied at once to the payment of the debt, instead of leaving them in the hands of the trustee

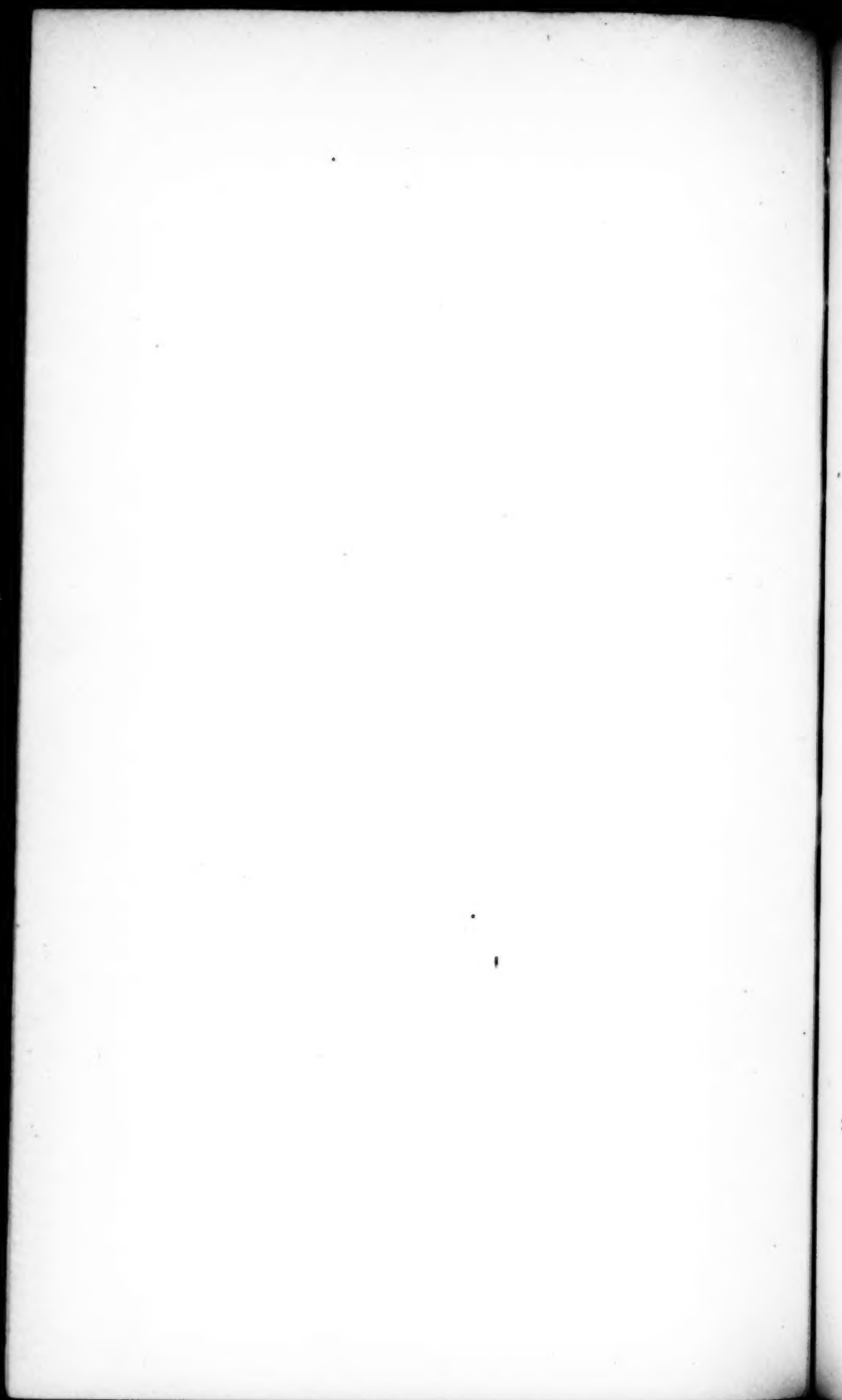
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without interest, and subjecting the mortgagor, perhaps, to even greater loss.

I am, therefore, of opinion that the judgment of the circuit court should be affirmed.



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## ACCOUNT.

SEE PLEADING, 7.

## ACKNOWLEDGMENT.

SEE DEED, 1.

## ADJOURNED TERM.

SEE GRAND JURY.

## ADMINISTRATION.

1. OF ESTATE OF A MARRIED MINOR: RIGHTS OF THE WIDOW: GUARDIAN. Under the Revised Statutes of 1855, when a minor having a guardian died, leaving a widow, his personal estate was not to be distributed by the guardian under the orders of the probate court, as provided by section 34, page 829. That section, though broad enough in its terms to include all minors, is held to refer only to such as died unmarried. If the minor was a married man, letters of administration had to be granted, and his estate distributed according to the administration law. The widow was entitled to dower in her husband's personal estate, and allowance of money or necessities for the support of the family, the same as other widows. If the guardian, proceeding under section 34, settled the estate and distributed the personalty among the husband's next of kin, such settlement was a nullity as against her, and she might maintain an action against the distributees to recover her share. *Norton v. Thompson*, 143.
2. WIDOW'S ALLOWANCE OF PERSONALTY CANNOT BE TAKEN OUT OF PROCEEDS OF REAL ESTATE. If a widow postpones her application for the allowance of personalty out of her deceased husband's estate, to which she is entitled under Wag. Stat., sec. 35, p. 88, until after the administrator has used the personalty in payment of debts, she loses her right, and her loss will not be made good to her out of the



proceeds of real estate subsequently sold to pay the remainder of the debts. *Droury v. Bauer*, 155.

3. ADMINISTRATOR'S BOND: PLEADING. A petition which shows that an administrator has failed to comply with an order of payment made by the probate court on final settlement of his accounts, states a good cause of action as against the sureties in his bond, without showing whether the funds were actually lost to the estate before or after the execution of the bond. *The State ex rel. Post v. Creus-bauer*, 254.
4. ———: ———: EVIDENCE: VOLUNTARY BOND. In a suit upon an administrator's bond, the only defense pleaded by the sureties was *non est factum*. The evidence offered in their behalf showed that the bond was never approved by the probate court, and that before it was given the administrator had given another bond. *Held*, that this evidence was improperly admitted; 1st, Because it was foreign to the issue; 2nd, Because it constituted no defense. The bond was good as a voluntary bond, though not approved by the probate court, and the party injured had his option to sue upon either of the bonds. *Ib.*
5. ———: ORDER OF PAYMENT: EFFECT ON ADMINISTRATOR'S SURETIES. It is well settled that a suit on the administration bond can be maintained against the sureties of an administrator upon an order of payment made by the probate court. The fact that a *sci. fa.* might have been issued against them out of that court after an execution against the administrator had proved barren of results, does not deprive the circuit court of jurisdiction. The order of payment is conclusive against sureties. *Dix v. Morris*, 66 Mo. 514, and other cases. *Ib.*
6. JURISDICTION OF PROBATE COURT: PARTNERSHIP: SETTLEMENT. The final settlement of a partnership, on the death of a co-partner must, under the administration laws of this State, be made in the probate court. Until final settlement, the circuit court has no jurisdiction. *Ensforth v. Curd*, 282.
7. JURISDICTION OF PROBATE COURT AS TO HOMESTEAD. The probate court having jurisdiction of the estate of a deceased housekeeper, or head of a family, has authority, under the statute, (1 Wag. Stat., § 5, p. 698,) to make the necessary order on an administrator to surrender to the party entitled, the possession of a homestead. *Brown v. Brown's Administrator*, 388.
8. DEED OF AN ADMINISTRATOR DE BONIS NON. The deed of an administrator *de bonis non*, appointed for the sole purpose of making a deed which his predecessor neglected to make, is a mere nullity, (following *Grayson v. Weddle*, 63 Mo. 523). *Long v. The Joplin Mining & Smelting Company*, 422.
9. ———: EQUITABLE TITLE OF PURCHASER WITHOUT DEED. A purchaser at an administration sale, duly approved by the probate court, as soon as he pays the purchase money, acquires an equitable interest in the land, which will constitute a sufficient equitable defense to an action of ejectment brought by the grantee of the heirs of the deceased, with actual or constructive notice of the facts. *Ib.*

10. ———, EXISTENCE OF, WHEN PROVEN—DELIVERY OF, WHEN PRESUMED. An order of approval of the report of a sale of real estate, of date November 29th, 1854, showed that, at the time of filing his report, the administrator also filed "a sale bill of said real estate;" the record showed that the purchase money was paid, and it was proven that the administrator and the purchaser had died in 1861; that since their deaths the property had been sold under two deeds of trust executed by the purchaser, of date, respectively, in 1855 and 1858; that those whose titles were divested by the administration sale, made no claim to the property for years after it had been sold under one of said deeds of trust, and not until it had become exceedingly valuable, and the busy seat of population and of mining industry; *Held*, that, as no sale bill of real estate is ever executed by an administrator, the words "sale bill of said real estate" would be construed to refer to, and establish the existence of, a deed for such real estate; and that its delivery and acceptance would be presumed on the following grounds: First, Its delivery would have been the usual concomitant, in the ordinary course of business, of the payment of the purchase money; Second, It would have been the obvious duty of the administrator to have delivered the deed upon the receipt of the purchase money; and, Third, As the deed was a plain conveyance without conditions, its acceptance would have been beneficial; especially as the other facts and circumstances were consistent with the existence of the deed, and tended to strengthen the presumption of its delivery and acceptance. *Ib.*
11. ADMINISTRATION SALE, TITLE UNDER; EFFECT OF FINAL SETTLEMENT. The title to real estate, once vested in a purchaser at an administration sale, will not be divested by a statement of the administrator, in his final settlement, of his acceptance of one-half of the purchase money only, on the ground that the purchaser was already the owner of one-half of said real estate. The amount of the purchase money was a question in which only those who were interested in the proceeds of the sale were concerned, and as to that they would be concluded by the final settlement if no appeal was taken therefrom. *Ib.*
12. ADMINISTRATOR: TITLE TO PROPERTY. The doctrine of the common law that an administrator takes the property of the intestate in absolute ownership does not prevail in this State; and the power of the personal representative of the deceased to dispose of the assets is limited and regulated by statute. *Chandler v. Stevenson*, 450.
13. ADMINISTRATION: "CREDITOR OF THE ESTATE." Wagner's Statutes, section 40, page 89, authorizing the executor or administrator of any estate to assign any note or bond of the estate to any creditor, legatee or distributee, in discharge of an amount of his claim equal to the amount of such note or bond, does not permit an administrator to assign a note belonging to the estate under his charge, to a person who is jointly liable with the estate upon a note to a third person. The joint obligor is not a creditor of the estate, though he may become such by paying off the note. *Ib.*
14. In a suit on the bond of an administrator, the settlement made by him need not be filed with the petition. *The State to use of Edwards v. Bartlett*, 581
15. BOND: ASSIGNMENT OF BREACH. In a suit upon a bond of an ad-

ministrator, the averment in the petition "in that, said G. T. B., did not, and has not turned over to plaintiff, E., the said sum of \$1,486.41, as by the condition of his said bond, and the order of said probate court, as aforesaid, he was in duty bound to do, though often requested so to do," sufficiently assigns a breach thereof. *Ib.*

16. ADMINISTRATOR'S BOND: ACTION BY CREDITOR OF ESTATE. A creditor whose demand against the estate has been allowed and classified, cannot maintain an action on the bond of the administrator to recover the amount of his demand because of the failure of the administrator to sell land for the payment of debts, when required to do so by an order of the probate court. *The State ex rel. Robinson v. Smith*, 641.

#### SEE LIMITATIONS, I.

#### ADOPTION.

EFFECT OF ADOPTION OF DESCENT. On the death of an adopted child, his estate will go to his relations by blood, and not to those by adoption; and this, even, where the estate which so descends has been derived from the adoptive parent. The statute of adoption (Wag. St. p. 256), has not changed the general rules of descent, established in the general statutes on that subject. *Reinders v. Koplemann*, 482.

#### ADVERSE POSSESSION.

1. POSSESSION UNDER A MISTAKE OF LINES. Possession by adjoining proprietors of land up to what they both erroneously suppose to be the true dividing line between them, with no intention on the part of either to claim beyond the true line, will not work a disseizin in favor of either of any land so erroneously occupied by him. *Houx v. Batteen*, 84.
2. MISTAKEN POSSESSION, WHEN ADVERSE. If one takes possession of the land of another, believing and claiming it to be his own, his possession is adverse. It is only where he occupies by mistake and with no intention of claiming any thing which does not belong to him, that it is not adverse. See *Houx v. Batteen*, *ante*, p. 84. *Walbrunn v. Bullen*, 164.
3. PROPOSAL TO BUY CONFLICTING CLAIM. A proposal from one in the possession of land to buy out the holder of the true title, does not necessarily amount to a recognition of this title, or an acknowledgment that the possession is not adverse. *Ib.*
4. LIMITATION. The actual, exclusive, open, continuous and adverse possession of a part of a tract of land for ten years by one claiming title to the whole tract, under deeds purporting to convey the same, will vest in such claimant the absolute title to the whole tract. *Lynde v. Williams*, 360.
5. MUST BE PROVEN, CANNOT BE PRESUMED. If such possession, however, be commenced by disseizin, such person, until the lapse of ten years, continues to be a mere disseizor, and his disseizin will not be

presumed to continue until the contrary appears; his possession for the requisite period must be proven, and will not be presumed. *Ib.*

6. EVIDENCE. The proof of an act done on the premises, which merely indicates an intention to hold the land, such as the posting on the land of a notice to the owner of such intention, is not sufficient proof of adverse possession. *Ib.*
7. DECLARATIONS AS TO POSSESSION, AS EVIDENCE. The declarations of one in possession of property that he held in his own right, or as tenant, or as trustee, are admissible for the purpose of explaining his possession; but his declaration in regard to the contract by which he acquired possession are not receivable in his favor. (Following *Darrett v. Donnelly*, 38 Mo. 492.) *The Hannibal & St. Joseph Railroad Company v. Clark*, 371.
8. ———: CERTIFICATE OF ENTRY, SUFFICIENT AS COLOR OF TITLE, WHEN. A certificate of entry obtained in good faith, upon the payment of the entrance money, from an officer having a right to make sales of public land, is sufficient color of title in connection with the adverse possession of a part of a tract of land, in the name of the whole, to vest the title to the whole tract in the purchaser, under the statute of limitations. *Ib.*
9. ———: ———, AS COLOR OF TITLE, UNAFFECTED BY CANCELLATION OF, WHEN. The cancellation of such certificate of entry by the commissioner of the general land office, if not brought home to the knowledge of the purchaser, will not destroy his color of title, and remit him, in his right of recovery, to that portion of the land actually in his possession for the period prescribed by the statute of limitations. *Quære*, whether it would do so, in case the cancellation were brought to the knowledge of the purchaser. *Ib.*
10. CONSTRUCTIVE ADVERSE POSSESSION, WHEN NOT ESTABLISHED. Where plaintiff's documentary title to a forty acre tract of land was better than that of the defendant, who, however, claimed such tract under a deed conveying the same and an additional tract of 651 acres, of which latter tract 600 acres had been inclosed by defendant and those under whom he claimed, for more than ten years prior to the commencement of the action; *Held*, that the actual occupation of the 651 acre tract did not, of itself, draw to it such a constructive adverse possession of the forty acre tract as would, under the statute of limitation, defeat plaintiff's better title to the same. *Leeper v. Baker*, 400.
11. ADVERSE POSSESSION. Where, however, evidence was given that such forty acre tract was literally swamp land and unfit for cultivation, with the exception of a few acres for the clearing and cultivating of which plaintiff would not have been compensated, and was only valuable for the timber upon it, and was incapable of being fenced without risk of having the fence washed away by high water; that defendant and those under whom he claimed, had paid taxes on it for more than ten years, and had used it, as incident to the 651 acre tract, to supply himself with rails and house-logs, and to water his stock at a pond thereon; that he had included it in a survey of the 691 acres made by him on the premises, and had duly recorded his deed for the entire tract; that plaintiff lived only eight miles

from the land, and had notified defendant about the beginning of his occupancy that he owned the forty acre tract; and, from the evidence, it was fair to presume that plaintiff was aware of defendant's claim to the same; *Held*, that a finding, under proper instructions as to adverse possession, in favor of the defendant, was not without evidence in its support, and that the judgment thereon should be affirmed. *Ib.*

12. LIMITATIONS: COLOR OF TITLE: ADVERSE POSSESSION. Under Wagner's Statutes, section 5, page 917, in order to establish a claim to land by possession of a part under color of title to the whole, two things must concur: First, There must be actual possession of part in the name of the whole; Second, The claimant must exercise, during the time of such partial possession, the usual acts of ownership over the whole. Nothing short of the concurrence of these two things for the continuous period of ten years will divest the true owner of his title. *Norfleet v. Hutchins*, 597.
13. WHERE it appeared that defendant's grantor, claiming the whole tract in controversy under a void deed, had for two or three years paid taxes on it, and, during that time, had once driven off trespassers, and defendant himself, since his purchase, had paid the taxes, and, some eight or nine years before the bringing of the suit, had put up a house and inclosed a "truck patch" of about half an acre on the land; *Held*, that there was no actual adverse possession of the premises for the statutory period within the meaning of the foregoing rule. *Ib.*

#### SEE EJECTMENT, 1.

#### FORCIBLE ENTRY AND DETAINER, 1.

#### LIMITATIONS.

#### AMENDMENT.

1. THE answer to a petition for a money judgment and to enforce a mechanic's lien averred that the sum sued for was not due at the filing of the answer, nor on the 6th day of January, 1872. On the second trial of the case, the defendant asked leave to amend by averring that the sum was not due when the action was commenced, which was refused; *Held*, no error. *Simmons v. Carrier*, 416.
2. PETITION: AMENDMENT. The original petition stated that the defendant, by its agents and servants, recklessly, carelessly and negligently caused one of its trains to strike, wound and kill one Moody. The amended petition, filed after the statutory time, charged that by the negligence and unskillfulness of the defendant's employees while running said train, the said Moody was struck and killed; *Held*, that the amendment set up no new cause of action. *Moody v. The Pacific Railroad Company*, 470.

## APPEAL.

1. A trial court may amend a record *nunc pro tunc* after appeal taken. The appeal deprives it of jurisdiction of the case but not of the records. *Exchange National Bank v. Allen*, 474.
2. WHEN the record shows nothing to the contrary, it will be presumed that an appeal from an inferior court was taken within the time allowed by law. *City of Kansas v. Clark*, 588.
3. KANSAS CITY CHARTER: APPEAL. The City of Kansas has the right of appeal from a judgment of acquittal in a prosecution under an ordinance of the city against gaming. (See Acts 1875, p. 262, § 10.) *Hough and Napton, JJ.*, dissenting. *Ib.* See also *Same v. Muhlback*, 638.

## ARRAIGNMENT.

JUDGMENT reversed because the record failed to show that the prisoner was arraigned. *The State v. Agee*, 264.

## ASSAULT.

ATTEMPT TO SHOOT. To constitute an offense under Wag. Stat., sec. 33, p. 450, it is not necessary that the person whose life is endangered by defendant's act, shall actually be injured. It is as much an offense under that section to shoot at a man and miss him, as to shoot at him and hit him. *The State v. Agee*, 264.

SEE PRACTICE, 1.

## ASSESSOR.

SEE PERJURY, 1.

TAX, 2.

## ASSIGNMENT.

1. PREFERENCE AMONG CREDITORS. The statute relating to voluntary assignments, (Wag. Stat., § 1, 150,) which provides that "every voluntary assignment, &c., made by a debtor to any person in trust for his creditors, shall be for the benefit of the creditors of the assignor in proportion to their respective claims," does not avoid an assignment which gives a preference to certain creditors. The assignment will stand, but it will inure to the benefit of all the creditors, as well those not named as those named. *Crow v. Beardsley*, 435.
2. THE word "assignment," as used in the above section, does not include a deed of trust. *Ib.*



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## ATTORNEY AND CLIENT.

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## BAILMENT.

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LARCENY, 2.

## BILL OF EXCEPTIONS.

A BILL OF EXCEPTIONS filed after the term, will not be considered, unless it appears by an entry of record that the opposing party consented to the filing. An entry showing merely that he was present when the court gave the appellant leave to file it out of time, is not sufficient; nor will the defect be cured by an entry subsequently made by the clerk in vacation reciting that consent was given. *The State v. Duckworth*, 156.

SEE MANDAMUS, 3.

NEW TRIAL, 1.

## BOND.

VOLUNTARY BOND OF ADMINISTRATOR. In a suit upon an administrator's bond, the only defense pleaded by the sureties was *non est factum*. The evidence offered in their behalf showed that the bond was never approved by the probate court, and before it was given the administrator had given another bond. *Held*, that this evidence was improperly admitted; 1st, Because it was foreign to the issue; 2nd, Because it constituted no defense. The bond was good as a voluntary bond, though not approved by the probate court, and the party injured had his option to sue upon either of the bonds. *The State ex rel. Frost v. Creusbauer*, 254.

SEE PLEADING, 5.

PRINCIPAL AND SURETY, 1, 2.

## BURGLARY.

INDICTMENT FOR BURGLARY WITH INTENT TO STEAL. An indictment under Wag. Stat., sec. 16, p. 455, charged that the defendant had committed burglary with intent to steal, and that he had stolen certain goods, but failed to state their value. The jury found him guilty of both burglary and larceny, but the court sentenced him only for the burglary. On appeal from this judgment, *Held*, that the indictment was sufficient to sustain it; it was not necessary to state the value of the goods stolen. *The State v. Beckworth*, 82.

SEE PLEADING, CRIMINAL, 1, 2.

## CERTIORARI.

A petition for a *certiorari* in the absence of a formal assignment of errors in the record sought to be reviewed, may be regarded as in the nature of an assignment of errors, and to this extent will be treated as a pleading in the cause; but the court cannot be called upon to consider any question raised by the petition unless it is also presented by the record of the inferior court. *The State ex rel. Halpin v. Powers*, 320.

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## CLERKS OF COURTS.

1. CLERK'S LIABILITY FOR FAILURE TO REPORT FEES. The criminal liability of the clerks of the several courts of this State for failure to file a statement at the end of each year, of the fees and emoluments received during the year, attaches immediately upon the expiration of the year, and not at the end of thirty days thereafter. It is the liability to a civil action which does not accrue till the thirty

days have elapsed. Wag. Stat., §§ 29, 31, p. 631. *The State v. O'Gorman*, 179.

2. PLEADING, CRIMINAL: NEGATIVING EXCEPTIONS IN STATUTES. Where a statute required the clerks of courts, at the end of each year, to file a statement of the fees and emoluments received during the year, and made it a misdemeanor to fail to comply with this requirement, but excepted certain cases from the operation of the act, *Held*, that an indictment under the act need not show that the case was not one of those excepted. *Ib.*
3. FRAUD IN OFFICE. The third count of the indictment in this case, examined and held good as an indictment for fraud in office under Wag. Stat., sec. 17, p. 487. *Ib.*
4. ———: EVIDENCE. Upon the trial of an indictment against a county clerk for failing to make the annual statement required by law, showing the amount of fees and emoluments received from his office during the year 1874, evidence offered by the State showed that he had made such statements in previous years. *Held*, that such evidence did not prejudice the defendant, and the admission of it was no ground for reversing a judgment against him. *Ib.*

SEE CONSTITUTIONAL LAW, 2.

#### COFFIN.

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#### COLOR OF TITLE.

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#### COMMON CARRIER.

1. COMMON CARRIER OF PASSENGERS: HACKMAN, ACTION AGAINST: PETITION NEED NOT AVER LEGAL CONCLUSIONS. In an action for damages for injuries received by plaintiff, in consequence of the unsoundness of a hack used by defendants in transporting persons from a railroad depot in a city to their several destinations therein, where the petition states that defendants were common carriers, and that plaintiff was accepted by them as a passenger, the law implies an agreement on the part of the plaintiff that he shall pay his fare, and an obligation on the part of defendants that he shall be safely carried, and no express contract to that effect need be averred. *Lemon v. Chanslor*, 340.
2. DUTIES OF: ONUS PROBANDI. It is the duty of carriers of passengers, as far as they are capable by human care and foresight, to carry safely those whom they take into their coaches, and they are responsible for any, even the slightest, neglect; and when a

passenger suffers injury by the breaking down or overturning of the coach, the presumption, *prima facie*, is that it was occasioned by some negligence of the carrier, and the *onus probandi* is upon him to establish that there has been, on his part, no negligence whatever, and that the injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent. *Ib.*

3. GRATUITOUS PASSENGER. In such case, the fact that the person receiving the injury was a gratuitous passenger, constitutes no defense. *Ib.*

SEE RAILROADS, 3, 4, 5.

#### CONSIDERATION.

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#### CONSPIRACY.

SEE EVIDENCE, 20.

#### CONSTITUTIONAL LAW.

1. UNDER the constitution of 1865, the question whether a general law could be made applicable to a given case was one addressed to the discretion of the Legislature. *Ensforth v. Curd*, 282.
2. STATUTE PARTLY VOID. That a statute authorized a judge to appoint a clerk, in violation of a provision of the constitution, would not invalidate other portions of the act. *Ib.*
3. CONSTITUTION OF 1865, DOUBLE LIABILITY OF STOCKHOLDERS. Under section 6, article 8 of the constitution of 1865, as amended, a stockholder in a corporation can not be made liable to a creditor when his stock is fully paid up. *Schricker v. Ridings*, 65 Mo. 208 followed. *Gausen v. Buck*, 545.

SEE PARTITION, 2.

RAILROAD, 1

#### CONTINGENT ESTATES.

SEE PARTITION, 1.

#### CONTINUANCE.

1. A second application for a continuance must disclose facts showing an honest effort on the part of the applicant to prepare his case for

trial, and legal diligence. If the application is made on the ground of the absence of a witness who lives in another county, and for whom a subpoena has been but lately issued, it should show when his residence was ascertained, and how soon steps were taken to ascertain it. *The State v. Whitton*, 91.

2. REQUISITES OF AFFIDAVIT. An affidavit for a continuance on the ground of the absence of witnesses, must state that there are no other witnesses obtainable by whom the facts sought to be proved by the absent witnesses could be proved, and must show diligence in attempting to procure the presence of the absent witnesses. *The State v. Simms*, 305.

SEE CRIMINAL LAW, 9, 11.

### CONTRACT.

1. COUNTY BOND TAX: LIMITATION ON THE RATE, PART OF THE CONTRACT: COUNTY REVENUE: MANDAMUS. One who takes county bonds issued under a statute which limits the rate of taxation that may be imposed for their payment to one-twentieth of one per cent., is chargeable with knowledge of the limitation. It enters into and forms part of the contract between him and the county; and the county court cannot be compelled, by mandamus, to appropriate other funds in the county treasury, raised for other purposes, to the payment of such bonds. Neither the fact that they have been reduced to judgment, nor the fact that the specific fund provided is inadequate, can change this rule. *The State ex rel. Watkins v. Macon County Court*, 29.
2. CONTRACT TO PAY ANOTHER'S DEBT. Defendants bought a pile of bricks, undertaking to pay for them at an agreed rate per thousand; part of the purchase money to go to the vendor, the rest to go in payments on two mortgages then outstanding against the bricks. It turned out that there were not as many bricks in the pile as the parties had estimated. Defendants took what there were, and paid for them at the contract rate, paying the amount due to the vendor and that due on the first mortgage. The holder of the second mortgage not being paid, sued for the amount of his debt. *Held*, that he could not recover; the defendants were not unconditionally liable to plaintiff under their contract. *Raithel v. Smith*, 258.
3. CONTRACT OF AFFREIGHTMENT: DAMAGES. A contract of affreightment contained this provision: "Claims for loss and damages must be presented in thirty days from date of shipment in order to receive attention." *Held*, that failure to present within thirty days did not cut off a claimant's cause of action. The language employed is too vague to be allowed that effect. Distinguishing *Rice v. Kansas Pacific R. R.*, 63 Mo. 314. *Dunn v. The Hannibal & St. Joseph Railroad Company*, 268.

SEE DAMAGES, 7, 9.

ESTATE, 1.

## CONTRIBUTION.

**BETWEEN CO-DEBTORS.** The doctrine of contribution is the result of general equity based on the ground of equality of burden and benefit, is as much applicable between principals as between sureties, and has been adopted as a rule of common law in this State. A debtor, therefore, may recover from his co-debtor, in an action at law, whatever he has been compelled to pay in excess of his due proportion, not only of the original demand, but of all costs necessarily incident thereto; and in determining this proportion, regard will be had only to the co-debtors who are solvent. *Van Petten v. Richardson*, 379.

## CONVERSION.

1. **PLEADING: CONVERSION.** If the cause of action relied on is the conversion of plaintiff's property to defendant's use, that fact should be directly alleged in the petition. It is not sufficient to allege it inferentially, or to state facts which constitute the evidence of conversion. *Perry v. Musser*, 477.
2. **CONVERSION.** The facts alleged in the petition in this case, *Held*, not to constitute a conversion. *Ib.*

## CONVEYANCE.

SEE DEED.

## CORPORATION.

1. **DOUBLE LIABILITY OF STOCKHOLDERS.** Under section 6, article 8 of the constitution of 1865, as amended, a stockholder in a corporation cannot be made liable to a creditor when his stock is fully paid up. *Schricker v. Ridings*, 65 Mo. 208 followed. *Gausen v. Buck*, 545.
2. **SPECIAL MEETING OF DIRECTORS: PRESUMPTION OF NOTICE.** When it is shown that a special meeting of the board of directors of a corporation was held, and that a quorum attended, it will be presumed, in the absence of evidence to the contrary, that due notice of the meeting was given to all the directors, and that all the steps were taken which were necessary to constitute it a valid meeting. *The Chouteau Insurance Company v. Holmes' Administrator*, 601.

## COSTS.

**ON DISMISSAL.** A court, dismissing a case for want of jurisdiction, has authority to render a judgment for costs. *Ensforth v. Card*, 282.

SEE CONTRIBUTION, 1.



## COUNTY BONDS.

1. COUNTY BOND TAX: LIMITATION ON THE RATE, PART OF THE CONTRACT: COUNTY REVENUE: MANDAMUS. One who takes county bonds issued under a statute which limits the rate of taxation that may be imposed for their payment to one-twentieth of one per cent., is chargeable with knowledge of the limitation. It enters into and forms part of the contract between him and the county; and the county court cannot be compelled, by mandamus, to appropriate other funds in the county treasury, raised for other purposes, to the payment of such bonds. Neither the fact that they have been reduced to judgment, nor the fact that the specific fund provided is inadequate, can change this rule. *The State ex. rel. Watkins v. Macon County Court*, 29.
2. MISSOURI & MISSISSIPPI RAILROAD BOND TAX: COMMON FUND OF THE COUNTY. The tax of one-twentieth of one per cent. authorized by section 13 of the charter of the Missouri & Mississippi Railroad Company (Acts 1865, page 86) is the only tax authorized by law to be collected to pay bonds issued under that charter. The common fund of the county collected for the purpose of defraying the current expenses of the county government is not applicable to their payment. *Ib*
3. COUNTY RAILROAD BONDS: COMMON FUND OF THE COUNTY. The extraordinary indebtedness incurred by a county in issuing bonds to pay a railroad subscription, is not one of the "expenses of the county" within the meaning of Wag. Stat., sec. 165, p. 1193, and cannot be paid out of the fund raised by taxation under that section. *Ib*.
4. ———: ———. The county court will not be compelled, by mandamus, to issue a warrant on the common fund of the county for the payment of railroad bonded indebtedness, when the result would be to withdraw from the treasury all the funds necessary for the support of the county government, and thus to disrupt and disorganize it. *Ib*.

SEE FRAUD, 1, 2.

## COUNTY CLERK.

SEE SCHOOLS, 1.

## COUNTY COLLECTOR.

SURETIES ON COLLECTOR'S BOND: EFFECT OF LEGISLATION EXTENDING TIME FOR SETTLEMENT. A change in the law by which the time for the annual settlements of county collectors is fixed a month later than that provided in the former law, and additional time is allowed in which to pay after settlement, operates to release the sureties on a collector's bond executed before the change. The effect of such a change is to postpone the State's right of action against the collector; and the rule that an extension of time given to the principal releases the surety, applies as well between the State and an individ-

ual, as between individuals. *The State to use of Carroll County v. Roberts*, 234.

COUNTY COURT.

SEE COUNTY BONDS, 4.

JUDGMENT, 2.

MALICIOUS PROSECUTION, 7.

MANDAMUS, 1, 2.

COUNTY TREASURER.

HIS BOND: COUNTY MUST SUE ON, FOR SCHOOL MONEYS. An action on the bond of a defaulting county treasurer to recover school moneys, is properly brought by the county in the name of the State to the use of the county. The statute (Wag. Stat., § 42, p. 1251) does not require it to be brought to the use of the county clerk. *The State of Missouri to the use of Saline County v. Sappington*, 454.

COUNTY REVENUE.

SEE COUNTY BONDS, 1, 2, 3, 4.

COUNTY WARRANT.

SEE MANDAMUS, 2.

COURTS.

1. THE CASS COUNTY PROBATE AND CRIMINAL COURT never had any existence. There could not, therefore, be a judge of such court either *de jure* or *de facto*. An indictment presented to a person assuming to act as such judge is *coram non judice* and void, (following *Ex parte Snyder*, 64 Mo. 59). *The State v. O' Brian*, 153.
2. THE act establishing the probate court of Buchanan county is constitutional. *State v. Geiger*, 65 Mo. 306. *Ensworth v. Curd*, 282.
3. LINN COUNTY PROBATE COURT: EXECUTION SALES. The general law respecting execution sales of real estate, (1 Wag. Stat., § 42, p. 609,) requires them to be made on some day during the term of the circuit court of the county where such real estate is situated. The act creating the probate court of Linn county, (Sess. Acts of 1853, § 6, p. 392,) provides that "all sales and executions shall be governed and conducted in like manner as sales now are, or may hereafter be, in the circuit court in this State," and by section 7, requires that deeds of sheriffs, making sales under executions issued from that

court, shall be acknowledged before the probate judge in probate term time; *Held*, that these provisions do not impliedly and necessarily confer a power to sell at any other time than the general law directs; and that a sale of real estate under execution during the session of the Linn probate court, and not during the session of the circuit court, was a nullity. Following *Mers v. Bell*, 45 Mo. 333. *Lynde v. Williams*, 360.

SEE ADMINISTRATION, 6.

### CRIMINAL LAW.

1. EVIDENCE: PRACTICE. On the trial of a criminal case a witness for the prosecution testified that he had been induced to leave the State, and had received money for that purpose. The evidence failed to connect the defendant with the transaction. But the judge and the prosecuting attorney instituted an inquiry for the purpose of showing by the witness that the parties implicated were certain officers of the law. The defendant having interposed frequent objections to the prosecution of this inquiry, the judge remarked in the presence of the jury: "I am asking for this testimony. This case seems to have been born in sin and brought forth in iniquity. That is the reason I asked those questions. If the officers of this court, and of this city, of these United States, are to get before the grand jury evidence without preferring preliminary charges in the preliminary courts, and then buy off witnesses without any preliminary examination, I will see that they are brought to justice, and that, too, speedily, without any preliminary charges. If the defendant is not connected with it, it can be withdrawn from the jury by instruction." But the evidence was not so withdrawn; *Held*, that the conduct of the court was error, requiring the reversal of the judgment, and would have been error even if the evidence had been withdrawn. *The State v. Rothschild*, 52.
2. SENDING LETTER THREATENING CRIMINAL ACCUSATION. Under Wagner's Statutes, section 24, page 456, it is an offense to send a letter threatening to accuse one of any crime, a misdemeanor as well as a felony. The word "crime," as there used, has the signification fixed by Wagner's Statutes, section 36, page 516, and is not to be taken as limited or explained by the words "or felony" used in connection with it. *The State v. Linthicum*, 60. 66
3. VERDICT SILENT AS TO ONE OF THE COUNTS OF THE INDICTMENT: RAPE. When an indictment, in distinct counts, charges a rape and an attempt to commit a rape upon the same person, referring to the same act, a verdict of guilty as to either count amounts to an acquittal of the crime charged in the other. The failure of the jury to make an express finding as to the latter, therefore, is not error requiring a reversal of the judgment. *The State v. Cofer*, 120.
4. EXPERIMENTS BY THE JURY OUT OF COURT. The counsel for the defendant in a criminal case, in the course of his argument to the jury after the close of the evidence, told them that they had a right to try for themselves whether worn-out boots, like those described by

the witnesses for the State, would make such tracks in the dust or sand as they described, and advised the jury to make the experiment. Several members of the jury accordingly did make the experiment, out of court, without obtaining the leave of the court, and in the absence of the defendant. *Held*, that this was such misconduct as invalidated the verdict, and the defendant was not precluded from alleging it as ground for a new trial by the fact that it was done at the instance of his counsel. It was the duty of the court and the State's attorney to have warned the jury against making the experiment. *The State v. Sanders*, 202.

5. A defendant in a criminal case does not, by answering an improper question asked of him upon cross-examination by the State's attorney, waive any objection to the question which has been made by his attorney and overruled by the court before he made the answer. *The State v. Rugan*, 214.
6. WITNESS. When the defendant in a criminal case testifies in his own behalf, he stands on the same footing as any other witness, and is subject to the same rules and tests, (following *State v. Clinton*, 67 Mo. 380). *Ib.*
7. INSANITY: INSTRUCTIONS. On the trial of an indictment for murder where the insanity of the prisoner was set up as a defense, the court instructed the jury that the fact that some or all of the ancestors of a person had been insane, did not of itself prove that person insane, and that in the absence of direct and preponderating evidence of insanity at the time of the killing, it could not be justified on that plea. *Held*, error. *The State v. Simms*, 305.
8. — : WITNESS, RULES OF EXAMINATION WHEN DEFENDANT IS WITNESS. The defendant in a criminal case, when he testifies in his own behalf, occupies the position of any other witness, and subjects himself to just as searching a cross-examination; and the prosecuting attorney has the same right to comment upon his testimony as on that of any other witness. *The State v. Testerman*, 408.
9. PREPARATION FOR TRIAL: CONTINUANCE. A person committed to jail upon a criminal charge, is under no obligation to prepare for trial until an indictment has been found. If, as soon as he is indicted, he sets about diligently to make his preparations, but does not succeed in securing the attendance of witnesses whose testimony is material to his defense, he is entitled to a continuance. *The State v. Wood*, 444.
10. CITY ORDINANCE: EFFECT OF REPEAL ON PENDING PROSECUTION. The repeal of an ordinance pending a prosecution under it operates to release the defendant, unless it is otherwise provided in the repealing ordinance. *City of Kansas v. Clark*, 588.
11. ABSENT WITNESS: IMPEACHING EVIDENCE: CONTINUANCE. Where, in order to avoid a continuance, the prosecuting attorney, under the act of 1875, (Sess. Acts 1875, p. 104,) consents that the defendant may read to the jury a statement of what an absent witness would swear to if present, as his testimony, the State may, by way of impeachment, give evidence to show that such witness has made a contrary statement; but the jury should be instructed, in explicit terms, that such evidence is received only for the purpose of de-

stroying the effect of the absent witness' testimony, and not as evidence of defendant's guilt. *The State v. Thomas and Allen Swain*, 605.

12. ACCUSED TESTIFYING FOR HIMSELF. A defendant testifying in his own behalf, in a criminal case, has as much credibility attached to his testimony as if testifying in a similar manner in a civil case. *Ib.*
13. REASONABLE DOUBT—CAPTIOUS DOUBT. The court condemns, as an innovation, an instruction that a captious doubt, or a mere possibility of innocence, is not to be regarded as a reasonable doubt. *Ib.*
14. WAIVER OF PRELIMINARY EXAMINATION. If a person charged with crime voluntarily waives a preliminary examination and enters into a recognizance to appear at the next term of court, he will be taken to have confessed that there was probable cause for the charge; proof of these facts constitutes *prima facie* evidence of probable cause. HENRY, J., dissenting. *Vansickle v. Brown*, 627.
15. INTOXICATING LIQUORS: CITY ORDINANCE. Under the city ordinance subjecting persons, other than licensed dramshop keepers and druggists, to a fine for selling intoxicating liquors in quantities less than a quart, a single sale of a glass of liquor is sufficient to support a conviction. *City of Kansas v. Muhlback*, 638.

SEE CLERKS OF COURTS, 1, 2, 3, 4.

LARCENY, 2.

## DAMAGES.

1. INTEREST ON. In an action against a railroad company to recover damages for injuries sustained by live stock in course of transportation, interest may be allowed on the amount of damages sustained, to be computed from the institution of the suit. *Dunn v. Hannibal & St. Joseph Railroad Company*, 268.
2. PUNITIVE DAMAGES. Plaintiff testified that after the purchase of her ticket from Kansas City to Utica, she exhibited it to the baggage master who checked her baggage to Utica, and it was put upon the train by the agents of the company, who assisted her in getting into a car of the same train; that upon the arrival of the train at a station some miles short of Utica, upon her refusal to get off at that station as requested by the conductor, he used profane and threatening language to her, and thereupon sent a brakeman, who took her little girl, thereby compelling her to follow with her baby, and leave the train at nine o'clock at night; that she was compelled to remain, in the dark and exposed to the cold, for half an hour until the freight train came along, and was made sick by the exposure; *Held*, that upon this evidence the trial court was justified in refusing an instruction asked by the defendant, that the plaintiff could not recover punitive, but only actual damages. *Hicks v. Hannibal & St. Joseph Railroad Company*, 329.
3. STREETS—OPENING OF: DAMAGES: MODE OF COMPUTATION. In estimating the damages sustained by the condemnation of property by

a city for the purposes of a street, where the whole lot has not been taken, the value of the land taken should be found, and then the increase or diminution in value of the remaining portion; or, the damages may be computed by ascertaining the difference between the value of the entire lot, with improvements, before, and the value of the premises remaining after, the condemnation. *The City of Springfield v. Schmook*, 394.

4. ———: EVIDENCE. What other persons have been allowed for their property in the opening or widening of a street, is not competent evidence of the amount of damage sustained by the defendant. *Ib.*
5. ———; ———: EVIDENCE. Where a short time prior to the institution of the proceedings for the widening of a street, the defendant agreed with the city to take a certain sum for a strip of land required for that purpose, and the agreement was not made by way of compromise, nor for the purpose of avoiding litigation, *Held*, that this agreement could properly be considered by the jury as evidence of the value which defendant, at that time, placed upon the strip, and an instruction of that purport asked by the city should have been given. *Ib.*
6. ———: DAMAGES—CONSEQUENTIAL. Consequential damages, in a proceeding to condemn land for the purpose of opening a street, should not be regarded. *Ib.*
7. PLEADING: DAMAGES. A petition which seeks to hold defendants liable for failure to proceed with diligence to collect a note, is fatally defective if it fails to allege that plaintiff was damaged by the failure. *Perry v. Musser*, 477.
8. RE-INSURANCE: MEASURE OF DAMAGES. In an action on a policy of re-insurance the true measure of damages is not what the re-assured has paid the original assured, but what he is bound, under his policy, to pay by reason of the loss. *Gantt v. The American Central Insurance Company*, 503.
9. CONTRACT: MEASURE OF DAMAGES: PRACTICE. Defendant took plaintiff's cattle to fatten until the 1st day of June, at six cents per pound for every pound gained. Defendant was ready to deliver the cattle on the 1st day of June, but plaintiff not being ready to receive them, they were not delivered until the 30th day of July. The trial court having instructed the jury that defendant was entitled to compensation for the extra time at the contract rate; *Held*, error. They should have been instructed to allow him what the extra pasturage was reasonably worth; but as all the evidence showed that it was reasonably worth as much as the contract price, this court refused to reverse the judgment in defendant's favor. *Boswell v. Dahlman*, 591.

SEE RAILROAD, 1, 2.

TRESPASS, 1.



## DEBT.

THE liability of sureties on an official bond is not a "debt" which, under the 31st section of the attachment law, a receiver is authorized to sue for in his own name. *The State ex rel. Fichtenkamm v. Gambs*, 289.

## DEED.

1. DEED: SIGNATURE IN WRONG NAME: CERTIFICATE OF ACKNOWLEDGMENT. An instrument which purports in the body of it to be the deed of Henry Trigler, and which has appended to it a certificate of a justice of the peace, in due form of law, that Henry Trigler had acknowledged it to be his act and deed, is admissible in evidence as the deed of Henry Trigler, notwithstanding it is signed "Henry Trigg;" but if the certificate is defective, it will not cure the defect in the deed, and the deed will not be admissible. *Houx v. Batteen*, 84.
2. REPUGNANT DESCRIPTIONS. Where a deed contains two descriptions of the land conveyed, one general, the other particular, if there is any repugnance the latter will control. *The Hannibal & St. Joseph Railroad Company v. Green*, 169.
3. TRUST DEED: NOMINAL CONSIDERATION: RAILROAD. It is no objection to a deed executed by the trustee of a land company, conveying a strip of ground for depot purposes to a railroad company which is building its road through a town laid out on the property of the land company, that the conveyance is made for the consideration of one dollar. *Ib.*
4. THE word "release" following the words "grant, bargain and sell," in a deed, *Held*, not to restrict the meaning of these words so as to destroy the covenants which by statute they import. *Altringer v. Capeheart*, 441.
5. THE consideration clause in a deed is always open to explanation. *Ib.*

SEE INFANCY, 1.

WITNESS, 1.

## DEEDS OF TRUST AND MORTGAGES.

1. PRIORITY OF MORTGAGE FOR PURCHASE MONEY. A mortgage given to a vendor to secure an unpaid balance of purchase money of land and recorded on the same day, has priority of one which is given by the vendee, before he has concluded the purchase, to a person who furnishes him the money to make the cash payment, notwithstanding the latter is recorded first. *Turk v. Funk*, 18.
2. CHATTEL MORTGAGE, WHEN VOID AS TO CREDITORS. A mortgage upon a stock of goods which provides that the possession of the goods shall remain with the mortgagor, is void as against creditors,

although recorded, unless it is acknowledged or proved as deeds conveying real estate are required to be acknowledged or proved. Wag. Stat., sec. 8, p. 281. So is one which allows the goods to be disposed of by the mortgageor in the usual course of business, (following *Lodge v. Samuel*, 50 Mo. 204, and other cases). *White v. Graves*, 218.

3. CHATTEL MORTGAGE: PRIORITY: NOTICE. F sold to C certain goods to be paid for partly in cash and partly in notes. To make the cash payment, the latter borrowed \$2,000 from G, it being agreed between the three that in consideration of C having one year to pay the loan, G should have the first lien upon the goods. F then delivered the goods to G, and on the same day a bill of sale, which was not recorded, and four notes payable three, six, nine and twelve months thereafter, were given by C to G. C afterwards, failing to pay his notes to F, gave F a chattel mortgage on the goods, which was recorded. *Held*, that the priority of F's mortgage over G's lien depended upon F's knowledge of the change in the agreement as to the time to be given by G to C on the \$2,000. *Foster v. Gillespie*, 643.
4. THIS KNOWLEDGE SHOULD BE ACTUAL. An instruction, therefore, that the bill of sale to G would have no validity as against F, unless the latter knew of the change in the terms of the credit given to C, "or had full opportunity or means of acquiring actual knowledge" of it; *Held*, error. *Ib.*
5. NOTES SECURED BY DEED OF TRUST: LIABILITY OF INDORSER. A deed of trust given to secure two promissory notes, which, by their terms, matured at different dates, provided that if the maker should fail to pay the debt or interest when the same should become due according to the tenor, date and effect of the notes, then both should become due and payable, and the holder should have the right to order a sale under the deed. Plaintiff having become the holder of both notes, upon default in payment of the first, caused a sale to be made, and the proceeds of the sale not being sufficient to satisfy both notes, on the day when the second became due according to its terms, demanded payment of the maker, and, payment being refused, caused notice of dishonor to be given to defendant who had signed the note as indorser. In an action on the note, *Held*, that the demand and notice came too late; that plaintiff having elected to declare a forfeiture on failure to pay the first note, the second then became due, and in order to charge defendant demand should have been made and notice given then. *HOUGH, J., dissenting. Noell v. Gaines*, 649.

SEE ASSIGNMENT, 2.

EQUITY, 7.

FRAUDULENT CONVEYANCE, 4.

#### DESCENT AND DISTRIBUTION.

1. WHERE one dies leaving a widow and child, and the child dies without issue, the mother surviving, she becomes the heir of the child. 1 Wag. Stat., § 1, p. 529. *Lynne v. Williams*, 360.

2. EFFECT OF ADOPTION ON DESCENT. On the death of an adopted child, his estate will go to his relations by blood, and not to those by adoption; and this, even, where the estate which so descends has been derived from the adoptive parent. The statute of adoption (Wag. Stat., p. 256) has not changed the general rules of descent, established in the general statutes on the subject. *Reinders v. Koppelman*, 482.

## DEVISE.

1. LIFE ESTATE, NOT ENLARGED INTO A FEE BY POWER TO SELL. The will of a testator, after devising all his real and personal estate to his wife during her life, contained this provision: "The foregoing bequest is made under the express proviso that my said wife \* \* \* will carry on and continue my business with my co-partners; but I will that no part of my real estate, still less the whole of it, be sold or otherwise disposed of before the lapse of twenty-five years. \* \* \* After the decease of my said wife, the property then left shall be divided as follows," &c.; *Held*, that the power thus impliedly given to sell the real estate did not enlarge the wife's life interest to an estate in fee. *Reinders v. Koppelman*, 482.
2. HEIRS. A testator devised a life estate in his property to his wife, and then declared that after her death a certain portion of it should go in remainder "to the nearest and lawful heirs" of his wife. *Held*, that the word *heirs*, as here used, meant those persons who should be her heirs at the time of her death and not those who should be her heirs apparent at the testator's death. *Ib.*

## DISSEIZIN.

SEE ADVERSE POSSESSION, 5.

## DOWER.

1. DOWER AND HOMESTEAD: WAIVER: ESTOPPEL: PROCEDURE. A widow entitled to both homestead and dower in land of her deceased husband, caused her dower to be assigned, and accepted the assignment, but, being ignorant of her right to a homestead, did not then claim it. Being administratrix of her husband's estate, she also procured from the probate court an order for the sale of all the lands of the estate, but no sale was ever made. In a proceeding subsequently instituted by her to have her homestead set out, *Held*, that her acts did not constitute either a waiver or an estoppel so as to prevent her from asserting her right; *Held*, further, that under section 6, page 698, Wag. Stat., the proper procedure was to have the homestead first set out, and then if its value were less than one-third of the real estate of her husband, dower should also be assigned; but this course should only be taken upon the terms that the widow execute a suitable relinquishment of the rights already acquired under the former assignment. *See v. Haynes*, 13.
2. HOMESTEAD AND DOWER: DOWER, HOW COMPUTED: NORTHAMPTON

**TABLES.** When land, in which a widow has a homestead right, has been sold for purposes of partition, she is entitled, under section 6 of the homestead law, (Wag. Stat., p. 698,) to receive out of the proceeds of the sale, first, the value of her homestead. If this equals or exceeds one-third of the whole estate, she will receive nothing further; but if it is less than one-third she will receive in addition, by way of dower, an annuity upon an amount sufficient to make the aggregate equal to one-third. In order to ascertain the present value of her interest in that sum, the Northampton tables might be used. *Graves v. Cochran*, 74.

3. **DOWER NOT TO BE DIMINISHED BY TAXES.** The amount allowed a widow for her dower out of the proceeds of the sale of the estate of her deceased husband, is not to be diminished by the taxes, or any portion of the taxes assessed against the land either in her husband's life-time or during her quarantine. *Ib.*

SEE ADMINISTRATION, 1.

#### DRAMSHOP.

1. An indictment for selling liquor without a license need not state the name of the person to whom or the place at which the sale was made. *State v. Spain*, 29 Mo. 415, and other cases. *The State Jaques*, 260.
2. **DRUGGIST: CRIMINAL PLEADING.** An indictment under Wag. Stat. of 1872, sec. 2, p. 549, for selling liquor without license, need not negative the existence of those facts, which by the act of 1874 (Sess. Acts, p. 46) authorize a druggist to sell without a license. If the defendant was a druggist, and as such, authorized to make the sale for medicinal purposes, that was matter of defense. It is never necessary in an indictment under a statute to negative the exceptions contained in a subsequent statute. *Ib.*

#### DRUGGIST.

SEE DRAMSHOP, 2.

#### EJECTMENT.

**ADVERSE POSSESSION.** Exclusive, peaceable and uninterrupted possession of a tract of land under color of title for a period of forty-five years, is sufficient to sustain an action of ejectment. *Merchants' Bank v. Evans*, 51 Mo. 335. *Houx v. Batteen*, 84.

SEE EQUITY, 4.

HOMESTEAD, 6.

#### ELECTION.

**CONTESTED ELECTION: NOTICE OF CONTEST: BLANK BALLOTS.** When an

election is contested on the ground that blank ballots have been counted in favor of the contestee, the notice of contest need not state the names of the voters who cast the blanks. *Wag. Stat.*, sec. 54, p. 573, requiring the names of all voters objected to, to be stated in the notice, does not apply, since the objection is not to the voters, but to the action of the officers of election in counting blanks as votes. *Moffatt v. Montgomery*, 162.

### EMBEZZLEMENT.

1. DESCRIPTION OF PROPERTY. An indictment for embezzlement described the property embezzled as "certain United States five-twenty government bonds, which were valuable securities, of the value of \$5,000." *Held*, a sufficiently particular description. *The State v. Meyers*, 266.
2. AGENCY. An indictment for embezzlement charged that defendant was the agent of the person whose property was embezzled, and that he received it as agent. *Held*, sufficient. It is not necessary to set out in detail the nature and purposes of the agency. The proof, however, must establish an agency within the meaning of *Wag. Stat.*, sec. 35, p. 458, and not an ordinary bailment. *Ib.*
3. OF PARTNERSHIP FUNDS. In an indictment under *Wag. Stat.*, sec. 35, p. 458, for embezzling the money of a co-partnership, the name of the individual partners need not be set out. *The State v. Mohr*, 303.

### SEE LARCENY, 2.

### EQUITY.

1. WILL NOT RELIEVE ON A GROUND NOT STATED IN THE PETITION: MISTAKE. Plaintiff being the beneficiary in a mortgage in which the land intended to be conveyed was not correctly described, brought his suit to have the mistake corrected. The holder of a later mortgage covering the same land, was made co-defendant with the mortgageor, the petition alleging that he knew of the mistake when he took his mortgage; and this was the only ground on which the pleadings placed the plaintiff's claim to relief as against him. At the trial it appeared that the later mortgage was given as security for a pre-existing debt. Plaintiff had judgment. On appeal by the holder of the later mortgage, it was contended, on behalf of the plaintiff, that even if the appellant had no notice of the earlier mortgage, as charged, still the judgment was right, since, the later mortgage being given to secure a pre-existing debt, the appellant was not a purchaser for a valuable consideration; *Held*, that the judgment could not be sustained on this ground, no such case being made by the pleadings; and the court having, upon an examination of the evidence, come to the conclusion that the appellant had no notice of the mistake, reversed the judgment. *Cox v. Esteb*, 110.
2. CONTRIBUTION BETWEEN CO-DEBTORS. The doctrine of contribution is the result of general equity based on the ground of equality of burden and benefit, is equally applicable between principals as between sureties, and has been adopted as a rule of common law in this State. A debtor, therefore, may recover from his co-debtor, in an action at law, whatever he has been compelled to pay in excess of his due proportion, not only of the original demand, but of all costs necessarily incident thereto; and in determining this proportion, re-

gard will be had only to the co-debtors who are solvent. *Van Petten v. Richardson*, 379.

3. **EQUITABLE TITLES: PRIORITY: NOTICE.** One who had an equitable title to land gave a deed of trust upon his interest, and afterwards conveyed it to another person upon the consideration of the cancellation of a note due from him to the purchaser, and subsequently his interest was again sold under an execution against him, and was bought by the plaintiff in execution. Pending the proceedings on the execution the first purchaser acquired the legal title. In a contest between the holder of the deed of trust and the other claimants, *Held*, that the former had the best equity as against the purchaser at the execution sale, and that his equity should prevail as against the other purchaser also, if the latter had notice of his claim when he bought. And the latter having acquired the legal title, with notice of the prior equity, as the evidence tended strongly to prove, a decree of the trial court divesting the legal title out of him and vesting it in the trustee in the deed of trust, was affirmed. *Nulsen v. Wishon*, 383.
4. **EQUITABLE TITLE OF PURCHASER AT ADMINISTRATION SALE: EJECTMENT.** A purchaser at administration sale duly approved by the probate court, as soon as he pays the purchase money, acquires an equitable interest in the land which will constitute a sufficient equitable defense to an action of ejectment brought by the grantee of the heirs of the deceased with actual or constructive notice of the facts. *Long v. The Joplin Mining & Smelting Company*, 422.
5. **WILL RELIEVE AGAINST FRAUDULENT JUDGMENT.** A court of equity will relieve against a judgment obtained against a defendant by a fraudulent combination between his co-defendants and the plaintiff; but this jurisdiction is rarely and reluctantly exercised. The case ought to be a very plain one to authorize interference. *Ritter v. Democratic Press Company*, 458.
6. **AGREEMENT BEFORE TRIAL TO RELEASE ONE DEFENDANT, NO FRAUD ON HIS CO-DEFENDANTS.** The fact that before the trial of a cause an agreement was made between the plaintiff and one of the defendants that the latter should be released on paying a very small part of the demand, does not, of itself, render a judgment subsequently obtained against all the defendants fraudulent as respects one of them who was not aware of the agreement. *Id.*
7. **EQUITY: INJUNCTION: MORTGAGE: MARRIED WOMAN.** Plaintiff being the owner of certain real estate which was subject to a mortgage, sold the same, the purchasers assuming the mortgage, paying partly in cash and partly in a note which was paid at maturity, and giving besides, their note for \$2,600, secured by a deed of trust on the land. The purchasers failing to pay off the mortgage debt, plaintiff was compelled to pay part of it. Subsequently defendants, who were husband and wife, being desirous of becoming the owners of the mortgage, but knowing that the holder, through friendship for the plaintiff, would not sell it without the plaintiff's consent, sought plaintiff's consent and assistance in effecting the purchase. Plaintiff would consent only on condition that defendants should refund to him what he had paid on the mortgage, should indorse the \$2,600 note which was still unpaid, and should waive the priority of the mortgage and hold it secondary to the deed of trust. In the ab-



sence of the wife, the husband agreed to these terms, paid the plaintiff the whole amount of the mortgage and took possession of it, and also took the \$2,600 note to his wife for her indorsement. She refused, and the note was returned to the plaintiff. Defendants subsequently caused a sale to be made under the mortgage, at which the wife became the purchaser. This action being brought to enjoin the delivery of a deed to her, and for other relief; *Held*, that plaintiff was entitled to the injunction and to a decree declaring the mortgage secondary to the deed of trust. The fact that the wife did not consent to the arrangement, as made by her husband, was immaterial, since it was by virtue of it that they had obtained possession of the mortgage, and it would operate a fraud on the plaintiff not to enforce it against her. For the same reason it was not material that she had no separate estate. *Barnum v. Bobb*, 619.

## ESTATES.

1. AGREEMENT TO CONVEY REAL ESTATE. The purchaser at an execution sale of real estate, gave the defendant in the execution a written promise to reconvey, upon the payment of a specified sum by a day named; but the defendant did not bind himself to make such payment, and the promise was founded on no consideration. On the same day the defendant accepted from the purchaser a lease of the same premises, went into possession, and paid rent, but never paid anything in redemption of the property; *Held*, that the promise for a reconveyance was a mere gratuity, giving the defendant an option to redeem, but no vested interest, and that his only interest in the property was the leasehold. *Merrv. The Franklin Insurance Company*, 127.
2. DEVISE: LIFE ESTATE, NOT ENLARGED INTO A FEE BY POWER TO SELL. The will of a testator, after devising all his real and personal estate to his wife during her life, contained this provision: "The foregoing bequest is made under the express proviso that my said wife \* \* \* will carry on and continue my business with my co-partners; but I will that no part of my real estate, still less the whole of it, be sold or otherwise disposed of before the lapse of twenty-five years. \* \* \* After the decease of my said wife, the property then left shall be divided as follows," &c.; *Held*, that the power thus impliedly given to sell the real estate did not enlarge the wife's life interest to an estate in fee. *Reinders v. Koppelman*, 482.

## SEE PARTITION, 1.

## TRUSTS, 2, 3.

## ESTOPPEL.

1. TRUSTEE: ESTOPPEL. One who claims under a deed which was executed by a trustee, and which, by reference, recognizes a plat executed by a predecessor in the same trust, cannot deny that the latter had authority to act as trustee. *The Hannibal & St. Joseph Railroad Company v. Green*, 169.

2. ESTOPPEL: MORTGAGE. A purchaser at a sale under a mortgage is not precluded from denying the validity of an older mortgage by reason of the fact that the auctioneer announced that the sale would be made subject to the older mortgage, and in consequence of this announcement the property was sold at much less than its real value. *White v. Graves*, 218.

SEE HOMESTEAD, 1.

### EVIDENCE.

1. EVIDENCE OF REPUTATION. A witness who is well acquainted with a person whose character is in question, and lives in his neighborhood, will be allowed to testify to his general reputation although he may never have heard it discussed or questioned. Frequently the highest evidence which can be offered of character is of this negative kind. *The State v. William Grate*, 22.
2. OF MEANING OF AMBIGUOUS LETTER. Upon an indictment for sending a threatening letter, parol evidence is admissible to explain the meaning of the letter, if the language is ambiguous. *The State v. Linthicum*, 60.
3. EVIDENCE OF UNAUTHORIZED SURVEY. A witness will not be allowed to testify how another person, who was neither a county surveyor nor a deputy county surveyor, nor acting under the authority of the United States, nor by consent of the parties to the suit, had made a survey of the premises in controversy, nor what the results were. Under Wag. Stat., sec. 11, p. 1308, the survey itself, if offered in evidence, would be inadmissible. But the witness will be permitted to testify to everything that he may know about corners, lines and monuments from having been present and assisted in making the survey. *Houx v. Batteen*, 84.
4. IMPEACHING TESTIMONY. Judgment reversed for error of the trial court in refusing to admit impeaching testimony. *The State v. Purdin*, 99.
5. UPON the trial of an indictment against a county clerk for failing to make the annual statement required by law, showing the amount of fees and emoluments received from his office during the year 1874, evidence offered by the State showed that he had made such statements in previous years. Held, that such evidence did not prejudice the defendant, and the admission of it was no ground for reversing a judgment against him. *The State v. O'Gorman*, 179.
6. VERDICT AGAINST THE WEIGHT OF EVIDENCE: SUPREME COURT. When the questions involved in a case have been submitted to the jury under proper instructions, the Supreme Court will not, in an action at law, reverse the judgment on the ground that the verdict is against the weight of evidence. *The St. Louis Type Foundry v. McCann*, 195.
7. A FORMER CONVICTION can only be proven by the record. *The State v. Rugan*, 214.
8. PRACTICE, CRIMINAL: WAIVER. A defendant in a criminal case does

not, by answering an improper question asked of him upon cross-examination by the State's attorney, waive any objection to the question which has been made by his attorney and overruled by the court before he made the answer. *Ib.*

9. THE rejection of cumulative evidence, even if in strictness receivable, is no ground of reversal, where it appears that the complainant was not prejudiced thereby. *Hicks v. The Hannibal & St. Joseph Railroad Company*, 329.
10. EVIDENCE, WHEN RECEIVABLE IN REBUTTAL. Plaintiff, in making out his case, offered evidence to prove that he was received as a passenger on defendants' hack, and without any fault of his own received the injuries of which complaint was made. Defendants then offered evidence to show that the hack was sound and well fitted for the service to which it was put, that it was not overloaded, and that the accident by which plaintiff was injured could not have been avoided by any precautions on their part. Plaintiff then offered evidence to rebut that given by defendants, and it was objected that this evidence should have been offered as part of the plaintiff's case, in chief. *Held*, that the evidence was properly received in rebuttal. *Lemon v. Chanslor*, 340.
11. DECLARATIONS AS TO POSSESSION, AS EVIDENCE. The declarations of one in possession of property that he held in his own right, or as tenant, or as trustee, are admissible for the purpose of explaining the possession; but his declarations in regard to the contract by which he acquired possession are not receivable in his favor. (Following *Darrett v. Donnelly*, 38 Mo. 492.) *The Hannibal & St. Joseph Railroad Company v. Clark*, 371.
12. EXCLUSION OF EVIDENCE, NOT GROUND OF REVERSAL WHEN. The ruling of the trial court in excluding evidence, although excepted to at the time, will not be reversed by the Supreme Court, unless the exclusion of proper evidence was assigned, as error, in the motion for a new trial. (Following *Brady v. Connelly*, 52 Mo. 19.) *Ib.*
13. OF MURDER. Evidence in relation to the time and place of the death of the deceased, admissible under one count of an indictment, is not rendered inadmissible because the allegation as to such time and place in another count is insufficient. *The State v. Testerman*, 408.
14. A previous difficulty between deceased and third parties had occurred about 10 o'clock on the morning of the same day that deceased was killed, at which defendant was not present, but there was evidence tending to show that he was aware that there had been a difficulty and had espoused the quarrel of such third parties; *Held*, that evidence of such former difficulty was admissible. *Ib.*
15. EVIDENCE of the cutting by defendant of a third party, participating in the same fight in which deceased was killed, is admissible as part of the *res gestae*. *Ib.*
16. OPINIONS. A carpenter, engaged in buying lumber and building houses, may testify as to the cost of lumber in a house, his opinion having been formed by a comparison of it with certain lumber furnished by him for another house. *Simmons v. Carrier*, 416.

17. PRACTICE. An objection to evidence comes too late when made for the first time in the Supreme Court. *Fulkerson v. Thornton*, 468.
18. "TRAIN RULES." Certain "train rules" made by the defendant and another company, regarding a track used by them jointly, but 200 miles distant from the place where the injury occurred, *Held*, irrelevant and inadmissible. *Moody v. The Pacific Railroad Company*, 470.
19. RES GESTAE. On the trial of the defendants for murder, testimony was offered and admitted showing that the deceased was seen riding rapidly down the road, and soon after a party of men, among whom were defendants, were seen riding in the same direction, likewise at a rapid gait; that soon after the party passed the witness, a pistol shot was fired, and some one of the party was heard to say: "Did you get him?" and another one replied: "Not yet." Three quarters of an hour later deceased met the same party a mile further down the road, and it was in an altercation which then ensued with one or more of them, that he was killed. The evidence relied on by the State to show who did the killing, was wholly circumstantial. *Held*, that the foregoing testimony should not have been admitted. The occurrences related were not near enough to the homicide in point of time to constitute part of the *res gestae*. *The State v. Thomas and Allen Swain*, 605.
20. EVIDENCE OF CONSPIRACY. Such testimony as the foregoing might be received as evidence tending to prove a conspiracy between the defendants and others to effect the death of the deceased, but it should be accompanied by evidence that the defendants were participants in the crime. *Ib.*
21. EVIDENCE OF GOOD CHARACTER. When the defendant in a criminal case has given evidence tending to establish his good character, he is entitled to have the jury instructed as to its effect. *Ib.*
22. EVIDENCE OF GOOD FAITH. In an action for malicious prosecution, the defendant will be allowed to testify that he acted in good faith and had no ill-feelings against plaintiff. A party to a suit may always testify as to the intention with which he did an act, when it is material to the issues to determine what the intention was. *Vansickle v. Brown*, 627.

SEE ADVERSE POSSESSION, 6.

COMMON CARRIER, 2.

CRIMINAL LAW, 5, 15.

DAMAGES, 4, 5.

FORCIBLE ENTRY AND DETAINER, 1.

INSANITY, 1.

INSURANCE, 3.

LARCENY, 5.

MALICIOUS PROSECUTION, 3, 4, 5, 6, 7.

MURDER, 2.

PRESUMPTIONS.

RAILROAD, 7.

VENDOR'S LIEN, 1, 2.

## EXECUTION.

LINN COUNTY PROBATE COURT: EXECUTION SALES. The general law respecting execution sales of real estate, (1 Wag. Stat., § 42, p. 609,) requires them to be made on some day during the term of the circuit court of the county where such real estate is situated. The act creating the probate court of Linn county, (Sess. Acts of 1853, § 6, p. 392,) provides that "all sales and executions shall be governed and conducted in like manner as sales now are, or may hereafter be, in the circuit court in this State," and by section 7, requires that deeds of sheriffs, making sales under executions issued from that court, shall be acknowledged before the probate judge in probate term time; *Held*, that these provisions do not impliedly and necessarily confer a power to sell at any other time than the general law directs; and that a sale of real estate under execution during the session of the Linn probate court, and not during the session of the circuit court, was a nullity. Following *Mers v. Bell*, 45 Mo. 333. *Lynde v. Williams*, 360.

2. MONEY IN THE HANDS OF A SHERIFF collected on execution is in *custodia legis*, and is not subject to levy on a subsequent execution against the plaintiff in the first. *The State ex rel. The Kansas City National Bank v. Boothe*, 546.
3. ATTACHMENT SALE: PROCEEDS IN HANDS OF SHERIFF. Persona property of W. was seized under an attachment, and being of a perishable nature, was sold by the sheriff and the proceeds deposited in a bank on his general account. The attachment was afterwards dissolved and an execution issued for the amount of the debt, which was delivered to the sheriff with directions to levy the same on the money in his hands; *Held*, that the money so held by the sheriff could not be seized on execution. *Ib.*

## FALSE PRETENSES.

2. OBTAINING GOODS UNDER FALSE PRETENSES. An indictment for obtaining a stock of goods in exchange for a tract of land under false pretenses, charged that defendant *designedly*, feloniously and falsely pretended that he was the owner of the land, and averred that in truth and in fact he was not the owner; but did not charge that he knew he was not the owner; *Held*, that this was a fatal defect; the *scienter* should have been expressly averred; the use of the word "*designedly*" did not dispense with it.

The indictment also charged that defendant pretended that he had an abstract which showed a perfect title in himself; but there was no averment that he did not have such an abstract; *Held*, that the absence of this averment was fatal, and the defect was not supplied by an averment that defendant well knew the abstract to be imperfect, and untrue in showing that he had title. If such was the fact, the abstract should have been set out as a false token or writing, and the defendant should have been charged with designedly, feloniously and falsely pretending that it was a true abstract, and correctly represented the title to be in him; and this charge should have been accompanied by a proper negative and an averment of the *scienter*. *The State v. Bradley*, 140.

2. OBTAINING PROPERTY UNDER FALSE PRETENSES: PLEADING, CRIMINAL. An indictment under Wag. Stat., sec. 47, p. 461, for obtaining the property of one H. M. under false pretenses, after setting out the false pretenses resorted to and charging that they were unlawfully, willfully, knowingly, feloniously and designedly made by defendant, averred that H. M., relying on them as being true, delivered his property to defendant, and further charged that by means of these false pretenses, defendant unlawfully, &c., obtained said property from said H. M. with intent to cheat and defraud said H. M. *Held*, that the indictment was not insufficient as failing to allege that the false pretenses were made with intent to cheat and defraud and were relied on by H. M. *The State v. Smallwood*, 192.

#### FENCE-RAILS.

WHEN PART OF THE FREEHOLD: SALE: TRESPASS: TREBLE-DAMAGES. A person in possession of land under a contract of purchase, by the terms of which it is provided that a failure to pay at the time agreed upon shall work a complete forfeiture of his interest, has no right, after default made, to sell the fence-rails used to inclose the premises. The fence constitutes part of the freehold, and the fact that the rails may at the time be accidentally or temporarily detached from it, does not change their nature. A sale under such circumstances carries no title, and if the purchaser removes them, he becomes liable as a trespasser, but not necessarily in treble-damages. *The Hannibal & St. Joseph Railroad Company v. Crawford*, 80.

#### FORCIBLE ENTRY AND DETAINER.

1. FORMER RECOVERY OF A PART OF A TRACT, AS EVIDENCE OF RIGHT TO THE WHOLE. A verdict and judgment of restitution in an action of forcible entry and detainer for a tract of land, part of a larger tract, all of which is claimed by defendant under the same alleged title, is, in a subsequent action of ejectment between the same parties, conclusive upon the question of the right of possession at the date of the forcible entry, not only as to the tract actually detained by defendant but as to the whole; and when restitution has been made under the judgment, the *statu quo* is restored, and the defendant's possession of the smaller tract becomes from the beginning the plaintiff's possession, and all constructive possession arising out of defendant's actual possession under color of title, is thereby extinguished. *Bradley v. West*, 69.



2. PARTIES DEFENDANT: AGENT. A writ of restitution in an action of forcible entry and detainer, will not necessarily be unavailing because the persons who were living upon the land at the institution of the suit were not made defendants. If they were the servants of the person who was made defendant, they can be dispossessed under the writ; and the fact that the defendant does not live in the county where the land lies does not alter the case. *DeGraw v. Prior*, 158.

#### FORGERY.

1. OF MUNICIPAL OBLIGATIONS: ELEMENTS OF THE CRIME. It is not essential to the crime of forgery that the person in whose name the instrument purports to be made, shall have legal capacity to make it. It is sufficient, under Wag. Stat., sec. 16, p. 470, if it is made with intent to defraud, and on its face would be likely to defraud. Thus, the making a false municipal certificate of indebtedness with intent to injure or defraud, is forgery, notwithstanding the municipality may have no power to issue such certificates. *The State v. Eades*, 150.
2. AN indictment charged the forgery of a receipt purporting to be the receipt of "Charles W. Jeffries;" the receipt set out *in hæc verba*, was signed "C. W. Jeffries;" *Held*, no variance. *The State v. Bibb*, 286.

#### FORMER CONVICTION.

SEE JUDGMENT, 1.

#### FRAUD.

1. LIMITATION TO ACTION FOR FRAUD IN ISSUE AND SALE OF COUNTY BONDS. In an action brought by a county to recover money which it had been compelled to pay to an innocent holder of certain negotiable bonds of the county, the petition charged that the defendant, by collusion with the justices of the county court, for the purpose of cheating and defrauding the county, had fraudulently procured the issue of the bonds to himself, and, in consummation of his fraudulent purpose, had afterwards sold and assigned them to the innocent purchaser for a valuable consideration. The issue of the bonds having taken place more than five years before the bringing of the action; *Held*, that the action was not, for that reason, barred by the statute of limitations, that the statute ran, not from the issue, but from the sale and assignment. Until then the fraud was not consummated. In the hands of the defendant the bonds were of no value in consequence of the fraud. The assignment was the crowning act of the scheme to defraud the county. *Phelps County v. Bishop*, 250.
2. COUNTY COURT ORDERS, COLLATERALLY ASSAILABLE FOR FRAUD: BONDS. An order of the county court allowing a demand against the county and directing the issue of bonds in satisfaction of it, is not such a judicial determination as cannot be collaterally assailed for fraud. *Ib.*

3. WHEN THE STATUTE OF LIMITATIONS HAS ONCE COMMENCED TO RUN, FRAUDULENT CONCEALMENT DOES NOT INTERRUPT IT. In June, 1864, plaintiff left with defendant a sum of money as a special deposit. On July 20th, 1864, he demanded the money of defendant, who refused to deliver it to him. On September 1st, 1871, he brought suit, to which defendant interposed the statute of limitations of five year. Plaintiff, in reply alleged, as an excuse, a fraudulent concealment of defendant as to what had become of the money; *Held*, that the statutory bar was complete, as the statute commenced to run from the date of the demand and refusal. *Battle v. Crawford*, 280.
4. EQUITY WILL RELIEVE AGAINST FRAUDULENT JUDGMENT. A court of equity will relieve against a judgment obtained against a defendant by a fraudulent combination between his co-defendants and the plaintiff: but this jurisdiction is rarely and reluctantly exercised. The case ought to be a very plain one to authorize interference. *Ritter v. The Democratic Press Company*, 458.
5. AGREEMENT BEFORE TRIAL TO RELEASE ONE DEFENDANT, NO FRAUD ON HIS CO-DEFENDANTS. The fact that before the trial of a cause an agreement was made between the plaintiff and one of the defendants that the latter should be released on paying a very small part of the demand, does not, of itself, render a judgment subsequently obtained against all the defendants fraudulent as respects one of them who was not aware of the agreement. *Ib.*

SEE CLERKS OF COURTS, 3.

EQUITY, 7.

FRAUDULENT CONVEYANCE, 4.

INSURANCE, 4, 6.

#### FRAUDULENT CONVEYANCE.

1. PLEADING, CRIMINAL: FRAUDULENT CONVEYANCE. An indictment under Wag. Stat., sec. 52, p. 462, for making a deed to land without reciting an existing mortgage covering the same property, is bad, unless it gives a particular description of the land. It is not sufficient to designate it as "a certain house and lot in Humansville, Polk county, Missouri." *The State v. Jones*, 197.
2. CHANGE OF POSSESSION. A merchant tailor having sold his stock of goods to a journeyman employed in his shop, absented himself from the county for a few days, during which time the goods were attached as his property. The purchaser was left in possession, but no notice was given of the sale, and no one knew of it but the parties and the attorney who drew the bill of sale. The same sign remained up over the door of the shop, and the same business advertisement was continued in the local paper. *Held*, that there was no such open, visible and unequivocal change of possession as would apprise the community, or those accustomed to deal with the vendor, that the goods had changed hands, and that the sale was, therefore, void under the statute relating to fraudulent conveyances.

(Following *Wright v. McCormick*, 67 Mo. 426, and other cases ) *Stern v. Henley*, 262.

3. CONSTRUCTION OF STATUTE: "OR:" "AND." The statute declaring that conveyances made with intent to hinder, delay or defraud creditors, shall be void, an instruction that the jury should find for the defendant, unless the conveyance was made to hinder, delay and defraud creditors, is erroneous.

The words "hinder," "delay" and "defraud" are not synonymous. *Crow v. Beardsley*, 435.

4. TRUST DEED: FRAUD. As against creditors, the participation of either the trustee or the beneficiaries of a deed of trust in the fraud of the grantor, is sufficient to avoid the deed. *Ib.*

#### GAMING.

SEE MUNICIPAL CORPORATION, 4.

#### GRAND JURY.

The circuit court has authority to empanel the grand jury at an adjourned term. *The State v. Sweeney*, 96.

SEE PRACTICE, CRIMINAL, 6.

#### GUARDIAN.

SEE ADMINISTRATION, 1, 2.

#### HACKMAN.

SEE COMMON CARRIER, 1.

#### HEIRS.

- A testator devised a life estate in his property to his wife, and then declared that after her death a certain portion of it should go in remainder "to the nearest and lawful heirs" of his wife. *Held*, that the words *heirs*, as here used, meant those persons who should be her heirs at the time of her death, and not those who should be her heirs apparent at the testator's death. *Reinders v. Koppelman*, 482.

#### HOMESTEAD.

1. WIDOW'S HOMESTEAD: DOWER: WAIVER: ESTOPPEL: PROCEDURE. A widow entitled to both homestead and dower in land of her deceased husband, caused her dower to be assigned, and accepted the assignment, but, being ignorant of her right to a homestead, did not then claim it. Being administratrix of her husband's estate, she

also procured from the probate court an order for the sale of all the lands of the estate, but no sale was ever made. In a proceeding subsequently instituted by her to have her homestead set out, *Held*, that her acts did not constitute either a waiver or an estoppel so as to prevent her from asserting her right; *Held, further*, that under section 6, page 698, Wag. Stat., the proper procedure was to have the homestead first set out, and then if its value was less than one-third of the real estate of her husband, dower should also be assigned; but this course should only be taken upon the terms that the widow execute a suitable relinquishment of the rights already acquired under the former assignment. *See v. Haynes*, 13.

2. **HOMESTEAD AND DOWER: DOWER, HOW COMPUTED: NORTHAMPTON TABLES.** When land, in which a widow has a homestead right, has been sold for purposes of partition, she is entitled, under section 6 of the homestead law, (Wag. Stat., p. 698,) to receive out of the proceeds of the sale, first, the value of her homestead. If this equals or exceeds one-third of the whole estate, she will receive nothing further; but if it is less than one-third she will receive in addition, by way of dower, an annuity upon an amount sufficient to make the aggregate equal to one-third. In order to ascertain the present value of her interest in that sum, the Northampton tables might be used. *Graves v. Cochran*, 74.
3. **FAMILY: WIFE LIVING APART FROM HER HUSBAND.** Whilst a marriage *de jure* exists, the husband is the head of a family, although composed only of his wife, who has left him; and although living apart from him at the time of his death, the wife is, under the homestead act of 1865, (Gen. Stat. 1865, p. 449,) where there are no minor children, entitled to the homestead. *Brown v. Brown's Administrator*, 388.
4. ———. Where a dwelling house and appurtenances were situated on an eighty acre tract in which the occupant had only a life estate, *Held*, that under the homestead act of 1865, upon his death, the right of homestead in his widow would attach to the remaining part of the farm which was owned by him in fee simple, and that she would be entitled to receive, in fee, a portion not exceeding 160 acres in quantity, nor \$1,500 in value. *Ib.*
5. ———: **HEAD OF A FAMILY.** Where the owner of a farm rented the same, and occupied but one room in the house, upon an agreed division between himself and his tenant of the profits and expenses, for the purpose of securing to himself the services and attention of the tenant and his family, *Held*, that this did not make the tenant the head of the family, nor deprive the owner of the control over the house previously exercised by him. *Ib.*
6. ———: **JURISDICTION OF PROBATE COURT.** The probate court having jurisdiction of the estate of a deceased housekeeper, or head of a family, has authority, under the statute, (1 Wag. Stat., § 5, p. 698,) to make the necessary order on an administrator to surrender to the party entitled, the possession of a homestead. *Ib.*

## HUSBAND AND WIFE.

1. REPLEVIN: WIFE'S PROPERTY. When a defendant in an action for the recovery of specific personal property claims the right to the possession as agent for his wife through a chattel mortgage in her favor and a sale thereunder, it is not necessary for him, in order to make good his defense, to show that the money secured by the mortgage was the separate property of his wife, or that the purchase at the sale under the mortgage was made to her use. *White v. Graves*, 218.
2. MAJORITY OF MARRIED WOMEN: DEED. Under the General Statutes of 1865 a married woman was of full age for the purpose of executing a deed when she attained the age of eighteen years. Construing sec. 1, p. 466 and sec. 1, p. 444. *Caho v. Endress*, 224.
3. RESULTING TRUST IN FAVOR OF WIFE. When a husband has entered land in his own name with money belonging to his wife's separate estate, because of a regulation of the land office, it is his duty, although he may be in embarrassed circumstances, to convey such land to a trustee for her benefit. *Payne v. Teyman*, 339.

SEE ADMINISTRATION, 1.

EQUITY, 7.

LIMITATIONS, 1.

VENDOR'S LIEN, 2.

## INDICTMENT.

SEE COURTS, 1.

LARCENY, 2.

PRACTICE, CRIMINAL, 1.

VARIANCE, 1.

## INFANCY.

MAJORITY OF MARRIED WOMEN: DEED. Under the General Statutes of 1865, a married woman was of full age for the purpose of executing a deed when she attained the age of eighteen years. Construing sec. 1, p. 466 and sec. 1, p. 444. *Caho v. Endress*, 224.

SEE ADMINISTRATION, 1.

## INITIALS.

SEE VARIANCE, 1.

## INSANITY.

**MURDER: EVIDENCE.** On the trial of an indictment for murder where the insanity of the prisoner was set up as a defense, the court instructed the jury that the fact that some or all of the ancestors of a person had been insane, did not of itself prove that person insane, and that in the absence of direct and preponderating evidence of insanity at the time of the killing, it could not be justified on that plea; *Held, error. The State v. Simms, 305.*

## INSOLVENCY.

SEE CONTRIBUTION, 1.

## INSTRUCTIONS.

1. If the only error in an instruction is that it requires one of the parties to prove more than he ought to be required to prove in order to make out his case, the adverse party cannot complain. *Houx v. Batteen, 84.*
2. WHERE the ground upon which a case is defended is fully, fairly and distinctly presented to the jury by several instructions, the fact that another instruction ignores some of the evidence bearing upon the point is not ground for reversing the judgment. *Browne v. The Clay Fire & Marine Insurance Company, 133.*
3. A party cannot complain if the court so modifies one of his instructions as to make it necessary for the other party, in order to sustain his case, to prove more than the instruction, as offered, required. *The State v. O'Gorman, 179.*
4. It is no error to refuse an instruction which seeks to submit to the jury a question already properly submitted by another instruction, or one which places the party's right to recover on a different ground from that presented by the pleadings and the evidence. *White v. Graves, 218.*
5. THE giving of contradictory instructions may afford sufficient ground for reversal. *The State v. Simms, 305.*
6. An instruction which is objectionable, because it ignores an issue in the case, is no ground for reversal, where all the other instructions directly and fairly present such issue, and the jury have not been misled thereby. *Parton v. McAdoo, 327.*
7. INSTRUCTIONS upon a theory of the case not presented by the pleadings, are properly refused. *Fulkerson v. Thornton, 468.*

SEE PARTIES, 2.



## INSURANCE.

1. **LIABILITY OF AGENT FOR PREMIUMS TAKEN AFTER COMPANY HAS BEEN EXCLUDED FROM THE STATE.** An agent of an insurance company who issues a policy and takes the premium after the company's certificate of authority to do business in this State has been revoked by the superintendent of the insurance department, is liable to return the premium notwithstanding he was not, at the time, aware of the revocation, and the four weeks notice of revocation required by Wag. Stat., sec. 32, p. 772, has not been given by the superintendent. *McCutcheon v. Rivers*, 122.
2. **FIRE INSURANCE: STATEMENT OF THE INTEREST OF THE INSURED: WARRANTY.** A party having but a leasehold interest in a house and lot, took out a policy of insurance upon the house, containing an express condition that, if the interest in the property to be insured be a leasehold, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance should be void. The policy contained no statement of the interest of the insured, but described the property as "his." The court, reversing a judgment for the plaintiff, *Held*, that if the insured truly represented his interest to the company its failure to incorporate the statement in the policy did not avoid the policy; but if he made no representation at all, his acceptance of the policy amounted to a declaration that his interest was absolute, and that did avoid it. *Mers v. The Franklin Insurance Company*, 127.
3. **EFFECT OF PROOFS OF LOSS AS EVIDENCE WHEN OFFERED BY THE COMPANY.** When an insurance company, being sued upon a policy, defends upon the ground that the plaintiff fraudulently overvalued the property destroyed, for the purpose of obtaining the insurance money, and, as a basis of proof, offers in evidence the sworn proofs of loss furnished by plaintiff, that does not make their evidence of the loss in favor of plaintiff. They are only evidence of the fact that they were made and delivered to the company. The principle, that when declarations of a party are introduced in evidence by his adversary, they are to be considered by the jury, as well for the party making as for the party offering them, has no application. *Browne v. The Clay Fire & Marine Insurance Company*, 133.
4. **RE-INSURANCE: RIGHTS AND DUTIES OF THE PARTIES TO THE CONTRACT: JUDGMENT: NOTICE.** An insurer whose risk is re-insured, is not obliged, in order to maintain his action against his re-insurer, to show that he has paid the loss. He may at once resort to his action against the re-insurer, and to such action the re-insurer may make the same defense that the re-assured could make against the original assured, or the re-assured may await a suit by the first assured, and when it is brought give notice of it to his re-insurer. If the re-insurer desires the claim contested, he may take part in the defense. If he neither participates in the defense, nor gives notice that he does not object to the claim, he will be taken to have required the re-assured to defend for him, and the latter becomes, by operation of law, *sub modo*, his agent for that purpose. If the re-assured then defends in good faith, the judgment will be binding upon the re-insurer as to all matters which could have been litigated therein, and will make him liable for the costs and expenses of the litigation; but no judgment collusively obtained will support a

recovery against the reinsurer. *Gantt v. The American Central Insurance Company*, 503.

5. RE-INSURANCE: AGREEMENT FOR RESISTANCE CONSTRUED. An insurance company having re-insured in other companies part of a risk on a boat load of cotton, and being about to be sued by the insured for a loss, entered into an arrangement with the re-insuring companies, by which it was agreed that the first insurer should employ such counsel as it saw proper, to defend the suit, and in the event the defense should be successful the re-insurers should pay their *pro rata* proportion of the attorneys' fees and costs, and in the event it should fail, they should pay their *pro rata* proportion of the judgment, attorneys' fees and costs. *Held*, that this agreement did not alter the relations of the parties to the contracts of re-insurance; that the re-assured undertook no new duty, and the re-insurers incurred no new obligation except the liability to pay a share of the expenses in the event of a successful defense; and this was merely supplemental in its nature and did not affect the policies; that the agreement, at most, made the re-assured the agent of the re-insurers for the purpose of making the defense, and not a trustee for them; that it did not irrevocably commit the defense to the re-assured, but the re-insurers had the right at any time to come in and defend on their own behalf; that the attorneys employed by the re-assured represented the re-insurers in the conduct of the suit; and that there was nothing in the agreement which required the re-assured company to retain a pecuniary interest in the litigation, or forbade it from making a compromise of its liability. *Ib.*
6. ———: COMPROMISE AGREEMENT CONSTRUED. An insurance company having entered into an agreement such as the foregoing with several re-insuring companies, afterwards, pending the litigation, without their consent, compromised with the assured by paying a certain sum in cash and agreeing, in the event a judgment should be rendered in favor of the assured in the pending suit, to assign the policies of re-insurance to them. The assured, on their part, agreed to enter satisfaction of any such judgment on receiving such assignments. The contract further reserved to the re-assured company the right to continue the defense of the suit, and provided that the assured should retain the money paid even though they failed in their suit. The assured subsequently recovered judgment, and the policies of re-insurance were then assigned to them, as had been agreed, and the judgment was entered satisfied. The re-insuring companies had knowledge of this contract for about a month before the trial took place, but took no step to interpose any defense for themselves, or to prevent the re-assured company from making the defense. In a suit upon one of the assigned policies brought by the trustees of the original assured; *Held*, that this contract created no conflict between the duty and the interest of the re-assured company; that all the re-insuring companies could demand an honest defense of the suit, and the contract did not disable the re-assured from making this; that the fact that it no longer had any substantial interest in the controversy did not disqualify it from continuing the defense; that the re-insuring companies having failed to interpose must be considered as having acquiesced in its right to do so, and in the absence of evidence of want of good faith on the part of the re-assured company in making the defense, the re-insurers must be bound by the judgment. *Ib.*



7. ———: MEASURE OF DAMAGES. In an action on a policy of re-insurance the true measure of damages is not what the re-assured has paid the original assured, but what he is bound, under his policy, to pay by reason of the loss. *Id.*
8. SERVICE OF PROCESS ON FOREIGN INSURANCE COMPANIES. The fourth section of the act of March 23rd, 1874, providing the mode of serving legal process on foreign insurance companies, (Sess. Acts 1874, p. 74,) operated a repeal of section 25, page 770, Wagner's Statutes, and where such a company has complied with that act by appointing a competent person its attorney for the purpose of receiving service in this State, service can lawfully be made only upon him. Delivery of the writ to a local agent at his place of business will not answer. *Baile v. The Equitable Fire Insurance Company*, 617.

## INTEREST.

- ON DAMAGES. In an action against a railroad company to recover damages for injuries sustained by live stock in course of transportation, interest may be allowed on the amount of damages sustained, to be computed from the institution of the suit. *Dunn v. The Hannibal & St. Joseph Railroad Company*, 268.

## INTOXICATING LIQUORS.

SEE MUNICIPAL CORPORATION, 5.

## JUDGMENT.

1. A former conviction can only be proven by the record. *The State v. Rugan*, 214.
2. COUNTY COURT ORDERS, COLLATERALLY ASSAILABLE FOR FRAUD: BONDS. An order of the county court allowing a demand against the county and directing the issue of bonds in satisfaction of it, is not such a judicial determination as cannot be collaterally assailed for fraud. *Phelps County v. Bishop*, 250.

SEE ADMINISTRATION, 5.

COUNTY BONDS, 1.

FORCIBLE ENTRY AND DETAINER, 1.

FRAUD, 4, 5.

INSURANCE, 4.

MALICIOUS PROSECUTION, 7.

MANDAMUS, 2.

REPLEVIN, 1.

## RES ADJUDICATA, 1.

## JURISDICTION.

1. RAILROADS: COUNTIES IN WHICH SUITS AGAINST MAY BE BROUGHT. Under the statute, (1 Wag. Stat., § 28, p. 294,) suits may be brought against railroad companies in any county where such companies have or usually keep an office or agent for the transaction of their usual or customary business. *Hicks v. The Hannibal & St. Joseph Railroad Company*, 329.
2. AFTER CHANGE OF VENUE. Plaintiff brought suit in the circuit court of Phelps county for damages sustained by the obstruction of a water-course. On the application of defendant, the suit was removed to the circuit court of Dent county. After the filing of the transcript in the latter court, an order was there made returning the transcript to the first court. In that court defendant appeared and filed a motion to strike out a part of plaintiff's replication, which was sustained. Thereafter, on plaintiff's motion, the cause was removed to the circuit court of Crawford county, where, after the filing of the transcript, and on motion of defendant, the suit was dismissed for want of jurisdiction; *Held*, error. *Taylor v. The Atlantic & Pacific Railroad Company*, 397.

SEE HOMESTEAD, 6.

INSURANCE, 8.

RAILROAD, 2.

## JURY.

ELEVEN JURORS. It is a fatal defect in the record if it shows that only eleven jurors were present when the verdict was received by the court. *The State v. Meyers*, 266.

SEE VERDICT, 2.

## JUSTICE'S COURT.

SEE RAILROAD, 2.

## JUSTICE OF THE PEACE.

SEE RAILROAD, 2.

## KANSAS CITY.

SEE MUNICIPAL CORPORATION, 4.

## LACHES.

1. **CONDITIONAL SALE: BONA FIDE PURCHASER WITHOUT NOTICE: LACHES: WAIVER.** A conditional vendor of personal property entitled by his contract to retake the property in case of condition broken, loses his right as against one who purchases from the conditional vendee *bona fide* and without notice of the condition, if the vendor is guilty of laches in asserting his right, or if his conduct has been such as to waive performance of the condition. *Kobbins v. Phillips*, 100.
2. **LACHES.** The testator of defendants having bought certain land in his own name at a sale made by order of the county court on the 23rd day of April, 1873, to satisfy a school mortgage, on the 20th day of September, 1873, sold it at an advance, and, on the 2nd day of January, 1874, died. The county court knew of the purchase by the deceased soon after it was made. On the 18th day of June, 1874, the county brought this suit to recover of defendants the profits made by deceased on the re-sale, claiming that he was acting as agent of the county. *Held*, that if the county ever had a cause of action it had been guilty of such laches as made it doubtful if this suit could be maintained. *The State ex rel. Polk County v. West*, 229.

## LANDS AND LAND TITLES.

## SEE FENCE-RAILS.

## LANDLORD AND TENANT.

**LANDLORD AND TENANT FEEDING CATTLE ON SHARES NO PARTNERSHIP.** An agreement between landlord and tenant, as a part of the consideration for the lease of a farm, that the landlord shall furnish stock enough to eat the hay, oats and corn raised on the demised premises, the tenant to feed the stock, and, upon sale being made, the landlord to be repaid his purchase money first out of the proceeds, and the remainder to be equally divided between the parties, does not constitute them partners in respect of stock bought and fed under the agreement. *Musser v. Brink*, 242.

## LARCENY.

1. **THERE** can be no conviction of larceny without proof of the value of the property stolen; and unless the record shows that there was such proof, the Supreme Court will set aside a conviction although the error was not pointed out by counsel. *The State v. Krieger*, 98.
2. **LARCENY AT COMMON LAW: BY BAILEE.** An intent to steal existing at the time of obtaining the property, is an essential element of the crime of larceny, both at common law and as defined by Wagner's Statutes, section 25, page 456, but not of the crime of larceny by a bailee as defined by Wagner's Statutes, section 37, page, 459. Hence, where defendant had borrowed a wagon and horses from the owners, and was making way with them, and attempting to convert them to his own use when he was arrested, *Held*, that he

could not be convicted on an indictment in the ordinary form under section 25 for grand larceny, without proof that he obtained the property with the intent of stealing it, and it did not matter that upon the evidence he might have been found guilty of larceny by embezzlement under section 37, without such proof. That is a different offense, and in order to sustain a conviction for it the indictment should have contained a count founded on that section. *The State v. Stone*, 101.

3. COFFIN—STEALING IS LARCENY: STATUTES CONSTRUED. It is larceny to steal a coffin in which the remains of a human being are interred. This was so at common law; and the rule is not changed by anything contained in Wag. Stat., secs. 11, 12, 13, p. 500. Sections 11 and 12 relate only to the exhumation of the remains. Section 13 prescribes the punishment for an attempt to remove the remains, or to steal the coffin, or any article interred with the body. Neither of them provides for the case where the theft of the coffin is actually accomplished. *The State v. Doepke*, 208.
4. PROPERTY IN A COFFIN. In an indictment for the larceny of a coffin in which the remains of a human being are interred, the coffin is properly laid to be the property of the person who furnished it and buried the deceased. *Ib.*
5. VALUE OF PROPERTY. In determining whether an offense is grand or petit larceny, the inquiry should be, not what is the value of the property stolen to the owner, but what price it would command in open market. *Ib.*

SEE PLEADING, CRIMINAL, 1, 2.

#### LEASE.

SEE ESTATE, 1.

#### LIMITATIONS.

1. STATUTE OF LIMITATIONS: MARRIED WOMAN. Where the widow of a minor, who died under guardianship, had re-married before the guardian made his final settlement, an action brought by her and her second husband, seven years after the settlement, to recover her share of her first husband's personal property from his next of kin, to whom the guardian had distributed it under the order of the probate court, in supposed compliance with section 34, page 829, Revised Statutes 1855, was not barred by the statute of limitation, although eleven years had elapsed since the first husband's death. *Norton v. Thompson*, 143.
2. LIMITATION TO ACTION FOR FRAUD IN ISSUE AND SALE OF COUNTY BONDS. In an action brought by a county to recover money which it had been compelled to pay to an innocent holder of certain negotiable bonds of the county, the petition charged that the defendant, by collusion with the justices of the county court, for the purpose of cheating and defrauding the county, had fraudulently procured the issue of the bonds to himself, and, in consummation



of his fraudulent purpose, had afterwards sold and assigned them to the innocent purchaser for a valuable consideration. The issue of the bonds having taken place more than five years before the bringing of the action; *Held*, that the action was not, for that reason, barred by the statute of limitations, that the statute ran, not from the issue, but from the sale and assignment. Until then the fraud was not consummated. In the hands of the defendant the bonds were of no value in consequence of the fraud. The assignment was the crowning act of the scheme to defraud the county. *Phelps County v. Bishop*, 250.

3. PLEADING, CRIMINAL: LIMITATIONS. When the fact is that the offense for which an indictment is found was not committed within the time fixed by the statute of limitations as a bar, the better practice is to allege the true time in the indictment, and then set forth the facts which avoid the bar of the statute. But see *State v. English*, 2 Mo. 182. *The State v. Meyers*, 266.
4. WHEN THE STATUTE COMMENCES TO RUN, FRAUDULENT CONCEALMENT DOES NOT INTERRUPT IT. In June, 1864, plaintiff left with defendant a sum of money as a special deposit. On July 20th, 1864, he demanded the money of defendant, who refused to deliver it to him. On September 1st, 1871, he brought suit, to which defendant interposed the statute of limitations of five years. Plaintiff, in reply alleged, as an excuse, a fraudulent concealment of defendant as to what had become of the money; *Held*, that the statutory bar was complete, as the statute commenced to run from the date of the demand and refusal. *Battle v. Crawford*, 280.
5. THE actual, exclusive, open, continuous and adverse possession of a part of a tract of land for ten years by one claiming title to the whole tract, under deeds purporting to convey the same will vest in such claimant the absolute title to the whole tract. *Lynde v. Williams*, 360.
6. CERTIFICATE OF ENTRY, SUFFICIENT AS COLOR OF TITLE, WHEN. A certificate of entry obtained in good faith, upon the payment of the entrance money, from an officer having a right to make sales of public land, is sufficient color of title in connection with the adverse possession of a part of a tract of land, in the name of the whole, to vest the title to the whole tract in the purchaser, under the statute of limitations. *The Hannibal & St. Joseph Railroad Company v. Clark*, 371.
7. ———: AS COLOR OF TITLE, UNAFFECTED BY CANCELLATION OF, WHEN. The cancellation of such certificate of entry by the commissioner of the general land office, if not brought home to the knowledge of the purchaser, will not destroy his color of title, and remit him, in his right of recovery, to that portion of the land actually in his possession for the period prescribed by the statute of limitations. *Quære*, whether it would do so in case the cancellation were brought to the knowledge of the purchaser. *Ib.*
8. COLOR OF TITLE: ADVERSE POSSESSION. Under Wagner's Statutes, section 5, page 917, in order to establish a claim to land by possession of a part under color of title to the whole, two things must concur: First, There must be actual possession of part in the name of the whole; Second, The claimant must exercise, during the time of such partial possession, the usual acts of ownership over the whole.

Nothing short of the concurrence of these two things for the continuous period of ten years will divest the true owner of his title. *Norfleet v. Hutchins*, 597.

9. WHERE it appeared that defendant's grantor, claiming the whole tract in controversy under a void deed, had for two or three years paid taxes on it, and, during that time, had once driven off trespassers, and defendant himself, since his purchase, had paid the taxes, and, some eight or nine years before the bringing of the suit, had put up a house and inclosed a "truck patch" of about half an acre on the land; *Held*, that there was no actual adverse possession of the premises for the statutory period within the meaning of the foregoing rule. *Ib.*

#### SEE ADVERSE POSSESSION.

#### EJECTMENT, I.

#### MALICIOUS PROSECUTION.

1. GIST OF THE ACTION. In an action for malicious prosecution, the questions to be tried are: did the defendant, when he instituted the prosecution, believe the plaintiff was guilty, and if so, did he have reasonable grounds for so believing; overruling *Hickman v. Griffin*, 6 Mo. 37. *NAPTON, J.*, dissenting. *Vansickle v. Brown*, 627.
2. MALICE: PROBABLE CAUSE. An action for malicious prosecution cannot be sustained without showing malice on the part of the prosecutor. Want of probable cause alone is not sufficient. Malice is not an inference of law from want of probable cause. *Sharpe v. Johnston*, 59 Mo. 557. *Ib.*
3. EVIDENCE: WAIVER OF PRELIMINARY EXAMINATION. If a person charged with crime voluntarily waives a preliminary examination and enters into a recognizance to appear at the next term of court, he will be taken to have confessed that there was probable cause for the charge; proof of these facts constitutes *prima facie* evidence of probable cause. *HENRY, J.*, dissenting. *Ib.*
4. EVIDENCE: CONDUCT OF ARRESTING OFFICER. In an action for malicious prosecution, evidence that the officer who arrested plaintiff, in making the arrest, conducted himself in an uncivil and insulting manner, is not admissible against the defendant, unless accompanied by evidence that his conduct was instigated by the defendant. *Ib.*
5. ———: ———: RES JUDICATA. In an action for malicious prosecution instituted by husband and wife against the defendant for causing the arrest and prosecution of the wife on a charge of obstructing the highway, a judgment in favor of the husband against the defendant in an action of trespass, is not admissible in evidence on the part of the plaintiffs, where it does not appear from the record, or otherwise, that the existence of the highway was involved in that suit, or where it does appear that the action was begun and judgment was rendered after the institution of the criminal pro-

ceedings. The question of probable cause is to be determined by the circumstances existing when the prosecution is begun. *Ib.*

6. ———: ORDER FOR OPENING HIGHWAY. In the foregoing action it appeared that the county court had made an order directing the opening of the highway in question through plaintiff's premises, and had subsequently made another order for the opening of a highway through the same premises, and that defendant was proceeding under the first order when plaintiff's wife made the obstruction for which defendant caused her arrest. The second order having been offered in evidence to show that defendant had no right to open the road under the first; *Held*, that it was properly excluded, because it did not purport to vacate any established road. *Ib.*
7. ———: VERBAL ORDERS OF COUNTY COURT. In the foregoing action it appeared that defendant, who was a road overseer, had applied to the county court for orders touching the opening of the highway in question, and had received verbal instructions to proceed with the opening under the old order. *Held*, that evidence of these facts was properly admitted, not for the purpose of showing the legality of the road, for verbal orders of the county court have no validity in law, but for the purpose of showing that defendant acted in good faith and without malice. *Ib.*
8. ———: EVIDENCE OF GOOD FAITH. In an action for malicious prosecution, the defendant will be allowed to testify that he acted in good faith, and had no ill-feelings against plaintiff. A party to a suit may always testify as to the intention with which he did an act, when it is material to the issues to determine what the intention was. *Ib.*

#### MANDAMUS.

1. WILL NOT ISSUE, WHEN. The county court will not be compelled, by mandamus, to issue a warrant on the common fund of the county for the payment of railroad bonded indebtedness, when the result would be to withdraw from the treasury all the funds necessary for the support of the county government, and thus to disrupt and disorganize it. *The State ex rel. Watkins v. Macon County Court*, 29.
2. MANDAMUS AGAINST COUNTY COURT FOR A WARRANT. When the county court has refused the application of a creditor of the county, whose claim has been reduced to judgment, for a warrant on the treasury payable out of a particular fund, it will not be compelled, by mandamus, to change its decision and grant the warrant; 1st, Because its action on the application is judicial; 2nd, Because an appeal lies from its order to the circuit court. *Ib.*
3. TO COMPEL A CIRCUIT JUDGE TO PRODUCE AND FILE A BILL OF EXCEPTIONS. The counsel of the respective parties to a suit being unable to agree upon a bill of exceptions, appellant's counsel, within a day or two after the judgment, prepared and presented one to the judge, requesting him to allow and sign it. The judge laid it aside for examination, and it was lost. After the lapse of the term, but within sixty days after the judgment, the time which by stip-

ulation between the counsel was allowed for preparing and presenting the bill, it was found and again presented to the judge, by whom it was again lost. After the lapse of the sixty days a second bill was presented to the judge, and he signed and returned it by a messenger to appellant's counsel. The next term of court passed without this second bill being presented for filing. Proceedings by mandamus were then instituted to compel the judge to produce either the original or the second bill, and file the same with the clerk, and make a *nunc pro tunc* entry on the records of the court, showing that the bill was filed in proper time. Pending these proceedings, the original bill was found and lodged in the clerk's office. Upon these facts the Supreme Court denied the application for a peremptory writ. *The State ex rel. Caldwell v. Redd*, 106.

SEE COUNTY BONDS, 1.

#### MARRIED WOMAN.

SEE HUSBAND AND WIFE.

#### MISSOURI & MISSISSIPPI RAILROAD.

SEE COUNTY BONDS, 1, 2, 3, 4.

#### MISTAKE.

SEE ADVERSE POSSESSION, 2.

EQUITY, 1.

#### MORTGAGE.

SEE DEEDS OF TRUST AND MORTGAGES.

#### MUNICIPAL BONDS.

SEE COUNTY BONDS.

#### MUNICIPAL CORPORATION.

1. CANNOT DELEGATE ITS LEGISLATIVE POWERS: WHARVES. It is well settled that the legislative powers of a municipal corporation cannot be delegated. They are in the nature of public trusts conferred upon the legislative assembly of the corporation for the public benefit, and cannot be vicariously exercised. Hence, a city authorized by its charter to erect, repair and regulate public wharves, and to fix the rate of wharfrage thereat, cannot lease its wharf, or farm out its revenues, or empower any one else to fix the rates of wharf-

age; and a contract whereby the city undertakes to do these things is void. *Matthers v. The City of Alexandria*, 115.

2. CITY ORDINANCE: MAY BE SHOWN TO BE UNREASONABLE. A city ordinance is not conclusive, but may be shown to be unreasonable. In a suit on a special tax bill for the building of a sidewalk, evidence is admissible to show that the ordinance authorizing its construction was unnecessary and oppressive—it being located in an uninhabited portion of the city and disconnected with any other street or sidewalk. *Corrigan v. Gage*, 541.
3. CITY ORDINANCE: EFFECT OF REPEAL ON PENDING PROSECUTION. The repeal of an ordinance pending a prosecution under it operates to release the defendant, unless it is otherwise provided in the repealing ordinance. *City of Kansas v. Clark*, 588.
4. KANSAS CITY CHARTER: APPEAL. The City of Kansas has the right of appeal from a judgment of acquittal in a prosecution under an ordinance of the city against gaming. (See Acts 1875, p. 262, § 10.) *HOUGH and NAPTON, JJ.*, dissenting. *Ib.*
5. INTOXICATING LIQUORS: CITY ORDINANCE. Under a city ordinance subjecting persons, other than licensed dramshop keepers and druggists, to a fine for selling intoxicating liquors in quantities less than a quart, a single sale of a glass of liquor is sufficient to support a conviction. *The City of Kansas v. Muhlback*, 638.
6. APPEAL. In such prosecutions the city has a right of appeal to the Supreme Court. *Ib.*

SEE DAMAGES, 3, 4, 5, 6.

FORGERY, 1.

TOWNSHIP, 1.

## MURDER.

1. IN THE FIRST DEGREE. Where the defendant was indicted for the murder of his step-daughter, a girl three years of age, and the evidence showed a continual course of brutal treatment on his part, extending through a period of several months, resulting in the death of the girl from bruises inflicted by defendant; *Held*, that an instruction that the jury might convict of murder in the second degree, was erroneous, as the evidence, if believed by the jury, presented a clear case of murder in the first degree.  
The tendency of the trial courts to encourage the sentimentalism of jurors who shrink from convicting of a capital crime, by giving them instructions which enable them to convict of a lower crime which the evidence does not sustain, condemned. *The State v. Mahly*, 315.
2. EVIDENCE: PRIOR ACTS. The conduct of defendant toward the deceased, prior to the time of the commission of the murder, *Held*, admissible in evidence. *Ib.*

3. **INDICTMENT FOR MURDER: ELECTION BETWEEN COUNTS.** An indictment contained two counts, one of which charged a third party with shooting and killing the deceased, and the defendant with being present aiding and abetting, and the other charged defendant with killing the deceased by cutting him with a knife, and the third party with being present aiding and abetting; *Held*, that the trial court committed no error in refusing to require the prosecutor to elect on which of the counts the defendant should be tried. *The State v. Testerman*, 408.
4. **MURDER IN THE SECOND DEGREE.** If an intentional killing is shown, but circumstances of malice and premeditation are not proved, the law presumes the killing to be murder in the second degree. *Ib.*
5. **PLEADING.** A count in an indictment alleged that of the wounds inflicted upon him, the deceased "languished and languishing, immediately did die;" *Held*, that this was an insufficient allegation as to the time and place of the death of the deceased. *Ib.*
6. **EVIDENCE.** Evidence in relation to the time and place of the death of the deceased, admissible under one count of an indictment, is not rendered inadmissible because the allegation as to such time and place in another count is insufficient. *Ib.*
7. **EVIDENCE.** A previous difficulty between deceased and third parties had occurred about 10 o'clock on the morning of the same day that deceased was killed, at which defendant was not present, but there was evidence tending to show that he was aware that there had been a difficulty and had espoused the quarrel of such third parties; *Held*, that evidence of such former difficulty was admissible. *Ib.*
8. **RES GESTAE.** Evidence of the cutting by defendant of a third party, participating in the same fight in which deceased was killed, is admissible as part of the *res gestae*. *Ib.*
9. **HOMICIDE IN THE COMMISSION OF ANOTHER FELONY.** Section 1, p. 445, Wagner's Statutes, provides that every murder "which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony shall be deemed murder in the first degree. *Held*, that the words "other felony" here refer to some felony collateral to the homicide, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself. They are merged in it, and do not, when consummated, constitute an offense distinct from the homicide. Section 33 p. 450, Wag. Stat., makes them a felony only when death does not ensue. Hence, where a homicide results from blows given willfully and maliciously and with intent to inflict great bodily harm, but without the intent to kill, it does not constitute murder in the first degree. *NORTON, J.* and *SHERWOOD, C. J.*, dissenting. *The State v. Shock*, 552.

SEE INSANITY, 1.



## NEGLIGENCE.

1. CROSSING RAILROAD TRACK: CONTRIBUTORY NEGLIGENCE. Moody the postmaster at Webster station on defendant's road, was in the habit of carrying the mail to one of its mail trains which stopped at the station at about 8:40 p. m. His office was near the station but across the track. Hearing a train approach at about the time the mail train usually passed, he picked up his mail bags and started to cross the track to the platform. The train was then 1200 feet distant, but running at great speed. Relying upon its stopping, he continued on his way, and was struck by the locomotive and killed. The testimony was conflicting as to whether the bell was rung or the whistle sounded. The train was a freight train, which, on account of the mail train being behind time, had been ordered to go on without stopping, and passed Webster station at the very time the mail train would have passed had it been on time; *Held*, that Moody was guilty of contributory negligence, and his representative could not recover. *Moody v. The Pacific Railroad Company*, 470.
2. CONTRIBUTORY NEGLIGENCE: RAILROAD. A passenger who jumps from a railroad train in motion, not for the purpose of escaping some impending peril, but merely to avoid being carried past the station at which he intended to stop, is guilty of negligence, and, if he sustains injury, cannot recover for it. *Nelson v. The Atlantic & Pacific Railroad Company*, 593.

## NEW TRIAL, MOTION FOR.

1. The motion for new trial must be incorporated in the bill of exceptions. *The State v. Sweeney*, 96.
2. THE Supreme Court will not review the rulings of the trial court on the admissibility of evidence, unless the attention of the latter court has been called to the supposed error by the motion for new trial. It is not sufficient that exceptions were duly taken at the trial. *Vineyard v. Matney*, 105.
3. THE ruling of the trial court in excluding evidence, although excepted to at the time, will not be reversed by the Supreme Court, unless the exclusion of proper evidence was assigned, as error, in the motion for a new trial. (Following *Brady v. Connelly*, 52 Mo. 19.) *The Hannibal & St. Joseph Railroad Company v. Clark*, 371.
4. THE Supreme Court will not review the proceedings below where the appellant has failed to file his motion for a new trial or in arrest of judgment within the time allowed by statute. *Exchange National Bank v. Allen*, 474.

## NOTICE.

SEE DEEDS OF TRUST AND MORTGAGES, 3, 4.

ELECTION, 1.

EQUITY, 3, 4.

INSURANCE, 4.

LACHES.

PRESUMPTIONS, 2.

PROMISSORY NOTE, 1.

### PARTIES.

1. TO A SUIT TO ENFORCE A VENDOR'S LIEN. When the administrator of a vendor of real estate who has died without making a conveyance, brings suit for the purpose of enforcing a vendor's lien for the unpaid purchase money, the heirs of the vendor should be made parties, and their presence cannot be dispensed with by tendering, either in the pleadings or at the trial, a deed from the heirs to the vendee, unless the vendee accepts the deed. *Leiper v. Lyon*, 216.
2. PRACTICE: DEFECT OF PARTIES. The objection of defect of parties can be raised only by demurrer or answer, not by instructions to the jury. *Dunn v. The Hannibal & St. Joseph Railroad Company*, 268.
3. DEFECT OF PARTIES: DEMURRER. Where the defect of want of a proper party to the suit is patent on the face of the petition, if it exists at all, it can only be taken advantage of by demurrer. If after a demurrer raising that point is overruled, the defendant answers over, he thereby waives the point, and cannot raise it anew by the answer. *The State of Missouri to use of Saline County v. Sappington*, 454.
4. THE COUNTY IS THE PROPER PARTY TO SUE FOR SCHOOL FUNDS. An action on the bond of a defaulting county treasurer to recover school moneys, is properly brought by the county in the name of the State to the use of the county. The statute (Wag. Stat., § 42, p. 1251) does not require it to be brought to the use of the county clerk. *Ib.*

### PARTITION.

1. OF CONTINGENT ESTATES. A partition will not be refused because there is a contingent estate in the land, which may hereafter be vested in persons not yet *in esse*. The parties not *in esse* are represented by those who take subject to their rights, and the partition or sale is conclusive, so far as third persons or purchasers are concerned. *Reinders v. Koppelman*, 482.
2. PARTITION SALE CONCLUSIVE AGAINST PERSONS NOT IN ESSE: CONSTITUTIONALITY OF STATUTE. The 4th section of the Partition Act (Wag. Stat. p. 967,) provides: "In case the share or quantity of interest of any of the parties \* \* \* be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be contingent, so that such parties cannot be named, the same shall be so stated in the petition." The 34th section (p. 971) provides that the sheriff's deed upon a sale in partition "shall be a bar against all persons inter-

ested in such premises who shall have been parties to the proceeding, and against all other persons claiming from such parties or either of them." *Held*, that these provisions do not, as against persons not *in esse* at the time a partition is made, dispense with the constitutional right of every man that his property shall be taken only by due process of law, and are not, as against such persons, unconstitutional. *Ib.*

#### PARTNERSHIP.

1. LANDLORD AND TENANT FEEDING CATTLE ON SHARES. An agreement between landlord and tenant, as a part of the consideration for the lease of a farm, that the landlord shall furnish stock enough to eat the hay, oats and corn raised on the demised premises, the tenant to feed the stock, and, upon sale being made, the landlord to be repaid his purchase money first out of the proceeds, and the remainder to be equally divided between the parties, does not constitute them partners in respect of stock bought and fed under the agreement. *Musser v. Brink*, 242.
2. JURISDICTION OF PROBATE COURT TO SETTLE PARTNERSHIP ESTATE. The final settlement of a partnership, on the death of a co-partner must, under the administration laws of this State, be made in the probate court. Until final settlement, the circuit court has no jurisdiction. *Ensworth v. Curd*, 282.
3. WHEN ONE PARTNER ENTITLED TO COMPENSATION FOR PERSONAL SERVICES RENDERED THE FIRM. Whether a partner is entitled to remuneration for services rendered the firm, depends upon the intention of the parties; an express agreement is not necessary, and in order to ascertain whether such compensation should be allowed, the circumstances which surrounded the parties, and their relative situations towards each other should be considered. *Cramer v. Bachmann*, 310.
4. ———: CASE IN JUDGMENT. Defendant, a skilled culturist, entered into partnership with plaintiff for the growing of grapes and the manufacture of wine. Plaintiff purchased a tract of land for such purpose, an undivided one-half of which was to be deeded to defendant, the amount paid for same by plaintiff being refunded to him out of profits realized. Nothing further was agreed upon at the time of the formation of the partnership. Defendant built a dwelling house and wine cellar, expended labor and capital of his own, and made a fruitful vineyard and extensive orchard on the tract. Plaintiff was engaged almost exclusively in an independent business of his own. Subsequently defendant, dissatisfied with the failure of plaintiff to convey to him the undivided half of the premises, sent the key of the wine cellar to plaintiff, and made preparations to return to St. Louis, from whence he, at plaintiff's request, had come, when plaintiff made the deed, and handed defendant a written agreement, signed by himself alone, which writing gave recognition to the idea that defendant was entitled to remuneration for both prior and subsequent labors in the interest of the firm. This writing defendant refused to sign, not regarding the compensation therein specified as sufficient, but returned again to his labors, in which he continued until the present proceeding resulted in a decree for dissolution. A referee having been appointed,

took an account and made report, which was approved, except in one particular, which was the allowance to defendant for services to the firm, there being no articles of co-partnership, and no writing or express agreement for the allowance of such compensation; *Held*, that the allowance was properly made. *Id.*

SEE EMBEZZLEMENT, 3.

PERJURY.

**FALSE RETURN TO TOWN ASSESSOR.** An indictment for perjury charged the defendant with making a false affidavit to a return of his taxable personal property to a town assessor. There was no averment that the town was vested with the power to appoint an assessor and levy taxes, or that defendant was a resident of the town, or that there was any ordinance or law requiring defendant to make the affidavit. *Held*, that for want of these averments the indictment was insufficient. They ought to have been made in order to enable the court to determine whether the town could require the assessment of defendant's personalty, and whether it could require him to make the affidavit. *The State v. Crumb*, 206.

PERSONAL INJURIES.

SEE NEGLIGENCE, 1.

PERSONAL PROPERTY.

SEE LARCENY, 4.

PLEADING.

1. **PLEADING: VENDOR'S LIEN.** Whether a petition is multifarious or not, is to be determined, not from the prayer, but from the allegations contained in it. Hence, when the petition stated that plaintiff sold certain land to defendants, who were husband and wife, and at their request made the deed to her, vesting in her a separate estate, and that both defendants gave their note for the purchase money, and then prayed for a general judgment against the husband on the note, a special judgment against the separate estate of the wife, and for a sale of the land to satisfy a lien which the plaintiff claimed as vendor; *Held*, that the petition set out only one cause of action, its object being to obtain a judgment against the husband for the unpaid purchase money and to subject the land to sale for its payment. *Davenport v. Murray*, 198.
2. **DEPARTURE IN PLEADING.** Where the replication averred that the hack, in which plaintiff was being carried, was overloaded, and evidence was offered in support thereof, and objection was made that the petition contained no such averment, and that, therefore, the replication was a departure from the cause of action stated in the petition, and that the evidence was, therefore, incompetent; but it also appeared that the answer averred that the hack was not over-

loaded, and that plaintiff's motion to strike out this part of the answer had been overruled; *Held*, that if there were a departure in pleading, the defendants, by tendering such an issue in their answer, were responsible for it, and could not be heard to complain of their own act. *Lemon v. Chanstor*, 340.

3. THE petition in a suit against two persons need not state that the liability was jointly incurred by the defendants. *Fellows v. Jernigan*, 434.
4. PLEADING: PETITION: REQUISITES OF CAPTION. The want of a proper statement in the caption of the capacity in which plaintiff sues is not fatal, where it is set out in the body of the petition. *The State to use of Edwards v. Bartlett*, 581.
5. ASSIGNMENT OF BREACH OF A BOND. In a suit upon a bond of an administrator, the averment in the petition "in that, said G. T. B., did not, and has not turned over to plaintiff, E., the said sum of \$1,486.41, as by the condition of his said bond, and the order of said probate court, as aforesaid, he was in duty bound to do, though often requested so to do," sufficiently assigns a breach thereof. *Ib.*
6. EXHIBITS. In a suit on the bond of an administrator, the settlement made by him need not be filed with the petition. *Ib.*
7. ACCOUNT. Though the statute forbids the introduction of any evidence respecting an account unless the same be set forth in the pleading, or a copy thereof be attached, yet if the statute be substantially complied with, any lack of particularity will be cured if the adversary fail to move to have the pleading made more definite and certain. *Meyer v. Chambers*, 626.

SEE COMMON CARRIER, 1.

CONVERSION, 1

DAMAGES, 7.

EQUITY, 1.

RAILROAD, 2.

#### PLEADING, CRIMINAL.

1. INDICTMENT FOR LARCENY OF TOWNSHIP PROPERTY. An indictment charged the defendant with stealing certain lumber, "the property of Blue Mound township, Livingston county." At the time of the alleged larceny, the township organization law (Acts 1873, p. 97) was in force, and authorized any county to adopt township organization upon a majority vote of the qualified voters. It provided that in counties adopting the law, each township, as a body corporate, should have power to purchase and hold such property, and so much thereof as might be necessary to the exercise of its corporate or administrative powers. In counties not so organized, townships had no such power. The indictment having been demurred to as insufficient because Blue Mound township could not be the

owner of the property; *Held*, that whether it could or not, depended on two facts, 1st, Whether Livingston county had adopted township organization; 2d, Whether the property alleged to have been stolen was necessary to the exercise of the corporate powers of the township; and these could only be determined by a trial. Hence the demurrer should have been overruled.

*Seemle*, that no averment of these facts in the indictment was necessary. *The State v. Bench*, 78.

2. INDICTMENT FOR BURGLARY WITH INTENT TO STEAL. An indictment under Wag. Stat., sec. 16, p. 453, charged that defendant had committed burglary with intent to steal, and that he had stolen certain goods, but failed to state their value. The jury found him guilty of both burglary and larceny, but the court sentenced him only for the burglary. On appeal from this judgment, *Held*, that the indictment was sufficient to sustain it; it was not necessary to state the value of the goods stolen. *The State v. Beckworth*, 82.
3. IT IS NO OBJECTION TO AN INDICTMENT presented at an adjourned term of court held in June, that it purports in the caption to have been presented at the "June special term." *The State v. Sweeney*, 96.
4. NEGATING EXCEPTIONS IN STATUTES. Where a statute required the clerks of courts, at the end of each year, to file a statement of the fees and emoluments received during the year, and made it a misdemeanor to fail to comply with this requirement, but excepted certain cases from the operation of the act, *Held*, that an indictment under the act need not show that the case was not one of those excepted. *The State v. O'Gorman*, 179.
5. IT IS NOT NECESSARY IN AN INDICTMENT for a common law offense to negative exceptions contained in a statute. *The State v. Dorpke*, 208.
6. AN INDICTMENT FOR SELLING LIQUOR WITHOUT A LICENSE, need not state the name of the person to whom or the place at which the sale was made. *The State v. Spain*, 29 Mo. 415, and other cases. *The State v. Jaques*, 260.
7. NEGATING EXCEPTIONS IN STATUTES: DRUGGIST. An indictment under Wag. Stat. of 1872, sec. 2, p. 549, for selling liquor without license, need not negative the existence of those facts, which by the act of 1874 (Sess. Acts, p. 46) authorize a druggist to sell without a license. If the defendant was a druggist, and as such, authorized to make the sale for medical purposes, that was matter of defense. It is never necessary in an indictment under a statute to negative the exceptions contained in a subsequent statute. *Ib.*
8. LIMITATIONS. When the fact is that the offense for which an indictment is found was not committed within the time fixed by the statute of limitations as a bar, the better practice is to allege the true time in the indictment, and then set forth the facts which avoid the bar of the statute. *The State v. Meyers*, 266.
9. EMBEZZLEMENT: PARTNERSHIP: INDICTMENT. In an indictment under Wag. Stat., sec. 35, p. 458, for embezzling the money of a co-partnership, the names of the individual partners need not be set out. *The State v. Mohr*, 303.



10. INDICTMENT FOR MURDER. A count in an indictment alleged that of the wounds inflicted upon him, the deceased "languished and languishing, immediately did die;" *Held*, that this was an insufficient allegation as to the time and place of the death of the deceased. *The State v. Testerman*, 408.

SEE EMBEZZLEMENT, 1, 2.

FALSE PRETENSES, 1, 2.

FRAUDULENT CONVEYANCE, 1.

LARCENY, 2, 4.

PERJURY, 1.

#### POWERS.

1. TRUSTEE'S DEED: CONDITIONS TO EXERCISE OF POWER OF SALE. A conveyance by the trustee of a land company, who, by the terms of his trust, is required, before selling, to give a bond for the faithful performance of his duties, and to sell according to rules to be prescribed by the company, carries the title to a stranger, although no bond has been given and no rules prescribed. *The Hannibal & St. Joseph Railroad Company v. Green*, 169.
2. TRUSTEE'S DEED: WHEN IT CONVEYS THE TRUST ESTATE. Where a person, who was at the same time trustee of a land company with a power of sale, and also a member of the company, and as such beneficially interested in the land, executed a deed in which he described himself as trustee of the company, and the land as part of the town which his trust deed proposed should be laid off on the property of the company, and for a full description referred to a plat of the town then on file; *Held*, that this was sufficient to show that he was executing the deed as trustee, and was not merely conveying his beneficial interest. *Ib.*

SEE ESTATES, 2.

#### PRACTICE.

1. INSTRUCTIONS ON QUESTION OF FACT. Whether a defendant, charged with assault with intent to kill, had, at the time of committing the alleged assault, reasonable cause to apprehend a design on the part of the other party to do him some great bodily injury and immediate danger that such design would be carried into execution, is a question for the jury, and when there is evidence tending to prove that he had such reasonable cause of apprehension, it is manifest error for the court to refuse instructions which submit that question to the jury. *The State v. Alley*, 124.
2. EQUITY PRACTICE. The trial court having taken the verdict of a jury upon two of the issues presented by the pleadings in an equity case, adopted the verdict and rendered judgment upon the whole

case without trying the remaining issues. *Held*, that this was error. *Leeper v. Lyon*, 216.

3. DEFECT OF PARTIES. The objection of defect of parties can be raised only by demurrer or answer, not by instructions to the jury. *Dunn v. The Hannibal & St. Joseph Railroad Company*, 268.
4. SAVING EXCEPTIONS. The ruling of the trial court in excluding evidence, although excepted to at the time, will not be reversed by the Supreme Court, unless the exclusion of proper evidence was assigned, as error, in the motion for a new trial. (Following *Brady v. Connelly*, 52 Mo. 19.) *The Hannibal & St. Joseph Railroad Company v. Clark*, 371.
5. AMENDMENT. The answer to a petition for a money judgment and to enforce a mechanic's lien averred that the sum sued for was not due at the filing of the answer, nor due at the 6th day of January, 1872. On the second trial of the case, the defendant asked leave to amend by averring that the sum was not due when the action was commenced, which was refused; *Held*, no error. *Simmons v. Carrier*, 416.
6. APPEAL. A trial court may amend a record *nunc pro tunc* after appeal taken. The appeal deprives it of jurisdiction of the case but not of the records. *Exchange National Bank v. Allen*, 474.
7. VARIANCE. The fact that a defendant was misled by a variance between the petition and the evidence, can only be shown by affidavit. 2 Wag. Stat., § 1, p. 1033. *Meyer v. Chambers*, 626.

#### SEE ADMINISTRATION, 14.

DAMAGES, 9.

NEW TRIAL, 1.

RAILROAD, 2, 9.

#### PRACTICE, CRIMINAL.

1. RETURN OF INDICTMENT INTO COURT. The failure of the record to show in express terms that the indictment was returned into open court by the grand jury, will not warrant the reversal of a judgment of conviction upon an indictment for murder. An indorsement upon the indictment as follows: "A true bill, H. A. S., foreman. Filed October 7th, 1875. D. N. L., Clerk," is sufficient evidence that the indictment was duly found and returned. *The State v. William Grate*, 22.
2. ABSENCE OF PRISONER DURING TRIAL. The fact that the prosecuting attorney began his closing argument to the jury while the defendant was temporarily absent from the court room, will not warrant the reversal of a judgment of conviction in the absence of evidence that the defendant was prejudiced thereby, or that any substantial portion of the argument was made before his return. *Id.*

3. A PLEA OF NOT GUILTY waives the necessity of a formal arraignment. *Ib.*
4. CHANGE OF VENUE: POWER OF COURT TO LIMIT NUMBER OF WITNESSES. A trial court has the power in a criminal case, by an order made before-hand, to limit the number of witnesses to be heard in reference to an application for a change of venue. Such a ruling comes within the domain of judicial discretion, and an appellate court will not interfere unless this discretion has been arbitrarily and abusively exercised; certainly not where the record fails to show that the defendant had witnesses which he was prevented by the order from examining. *The State v. Whitton*, 91.
5. VERDICT: FAILURE TO FIND ON ONE COUNT OF AN INDICTMENT. When an indictment consists of two counts, a verdict finding the defendant guilty as to one, but silent as to the other, is a virtual acquittal as to that count. It would be more regular to enter a *nolle prosequi*, or to have a finding of not guilty on that count; but the irregularity does not prejudice the defendant, and hence does not warrant setting aside the verdict. *Ib.*
6. GRAND JURY. A motion in arrest of judgment on the ground that the record does not show that the grand jury, which returned the indictment against defendant, was empaneled and sworn, is properly overruled. The objection comes too late after verdict. *The State v. Smallwood*, 192.
7. ARRAIGNMENT. Judgment reversed because the record fails to show that the prisoner was arraigned. *The State v. Agee*, 264.
8. ELEVEN JURORS. It is a fatal defect in the record if it shows that only eleven jurors were present when the verdict was received by the court. *The State v. Meyers*, 266.
9. CONDUCT OF TRIAL: ARGUMENT FOR THE STATE: IMPROPER REMARKS. The prosecuting attorney, in his closing argument to the jury, in referring to the evidence of defendant, who had testified in his own behalf, said: "It was incumbent on him to show how these things were. Did he tell us how she was hurt? It was incumbent on him to prove how she was hurt," and, also, "The preponderance of testimony was in favor of conviction and against the defendant, and upon such evidence they must convict." *Held*, error for which the judgment should be reversed.  
It is not the office of prosecuting attorneys to declare the law to the jury. *The State v. Mahly*, 315.
10. INDICTMENT: ELECTION BETWEEN COUNTS. An indictment contained two counts, one of which charged a third party with shooting and killing the deceased, and the defendant with being present aiding and abetting, and the other charged defendant with killing the deceased by cutting him with a knife, and the third party with being present aiding and abetting; *Held*, that the trial court committed no error in refusing to require the prosecutor to elect on which of the counts the defendant should be tried. *The State v. Testerman*, 408.

2. **INDICTMENT IN SEVERAL COUNTS: VERDICT.** A verdict will not be disturbed because it does not specify the count under which the defendant was found guilty, when it is supported by one good count in the indictment. *Ib.*

SEE ARRAIGNMENT.

CRIMINAL LAW, 1.

GRAND JURY.

### PRACTICE IN SUPREME COURT.

SEE DAMAGES, 9.

LARCENY, 1.

NEW TRIAL, 2.

RAILROAD, 2.

### PRESUMPTIONS.

1. **AS TO APPEALS.** When the record shows nothing to the contrary, it will be presumed that an appeal from an inferior court was taken within the time allowed by law. *City of Kansas v. Clark*, 588.
2. **CORPORATION: SPECIAL MEETING OF DIRECTORS: PRESUMPTION OF NOTICE.** When it is shown that a special meeting of the board of directors of a corporation was held, and that a quorum attended, it will be presumed, in the absence of evidence to the contrary, that due notice of the meeting was given to all the directors, and that all the steps were taken which were necessary to constitute it a valid meeting. *The Chouteau Insurance Company v. Holmes' Administrator*, 601.

SEE ADVERSE POSSESSION, 5.

### PRINCIPAL AND AGENT.

1. **PRINCIPAL AND AGENT: RAILROAD.** A railroad company is not responsible for the error in a town plat on which the location of its right of way is incorrectly represented, merely because the persons who prepared and filed it were its engineer and local agent. To make it responsible, there should be proof that these persons were in that respect authorized to act for the company. *The Hannibal & St. Joseph Railroad Company v. Green*, 169.
2. **EMBEZZLEMENT: AGENCY.** An indictment for embezzlement charged that defendant was the agent of the person whose property was embezzled, and that he received it as agent. *Held*, sufficient. It is not necessary to set out in detail the nature and purposes of the agency. The proof, however, must establish an agency within the meaning

of Wag. Stat., sec. 35, p. 458, and not an ordinary bailment. *The State v. Meyers*, 266.

- 3 AGENT'S AUTHORITY TO RECEIVE PAYMENT. An agent who sells by sample and on credit, and is not intrusted with the possession of the goods to be sold, has no implied authority to receive payment. *Rice v. Groffman*, 56 Mo. 434, distinguished. *Butler v. Dorman*, 298.

SEE FORCIBLE ENTRY AND DETAINER, 2.

INSURANCE, 1, 4, 5.

#### PRINCIPAL AND SURETY.

1. SURETIES ON COLLECTOR'S BOND: EFFECT OF LEGISLATION EXTENDING TIME FOR SETTLEMENT. A change in the law by which the time for the annual settlements of county collectors is fixed a month later than that provided in the former law, and additional time is allowed in which to pay after settlement, operates to release the sureties on a collector's bond executed before the change. The effect of such a change is to postpone the State's right of action against the collector; and the rule that an extension of time given to the principal releases the surety, applies as well between the State and an individual, as between individuals. *The State to use of Carroll County v. Roberts*, 234.
2. THE liability of sureties on an official bond is not a "debt" which, under the 31st section of the attachment law, a receiver is authorized to sue for in his own name. *The State ex rel. Pichtenkamm v. Gamba*, 289.

SEE ADMINISTRATION, 3, 4, 5.

#### PROCESS.

SEE INSURANCE, 8.

#### PROMISSORY NOTE.

SECURED BY DEED OF TRUST: LIABILITY OF INDORSER. A deed of trust given to secure two promissory notes, which, by their terms, matured at different dates, provided that if the maker should fail to pay the debt or interest when the same should become due according to the tenor, date and effect of the notes, then both should become due and payable, and the holder should have the right to order a sale under the deed. Plaintiff having become the holder of both notes, upon default in payment of the first, caused a sale to be made, and the proceeds of the sale not being sufficient to satisfy both notes, on the day when the second became due according to its terms, demanded payment of the maker, and, payment being refused, caused notice of dishonor to be given to defendant who had signed the note as indorser. In an action on the note, *Held*, that the demand and notice came too late; that plaintiff having elected

to declare a forfeiture on failure to pay the first note, the second then became due, and in order to charge defendant demand should have been made and notice given then. *Hough, J., dissenting. Noell v. Gaines*, 649.

## PROSECUTING ATTORNEY.

SEE PRACTICE, CRIMINAL, 9.

WITNESS, 4.

## RAILROAD.

1. RAILROAD DOUBLE-DAMAGE LAW: IT IS PENAL AND NOT UNCONSTITUTIONAL. That clause of the 43d section of the railroad law which allows double-damages to the owner of stock killed on a railroad through the failure of the company to maintain such fences as the law requires, is a police regulation chiefly intended for the protection of the traveling public, and is penal in its nature. But in giving the penalty to the owner instead of the public school fund, it is not in conflict with section 5, article 9, of the constitution of 1865, which provides that "the net proceeds of all sales of lands and other property and effects that may accrue to the State by escheat, \* \* \* or from fines, penalties and forfeitures," shall go to the public school fund; nor with section 8, article 11, of the constitution of 1875, which provides that "the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State," shall go to that fund. Both of these provisions refer only to such fines, penalties and forfeitures as the Legislature might provide should accrue to the State. *Barnett v. The Atlantic & Pacific Railroad Company*, 56.
2. ACTION TO RECOVER DOUBLE-DAMAGES: JUSTICE'S JURISDICTION MUST APPEAR: PRACTICE IN SUPREME COURT. In an action for double-damages against a railroad company under the 43d section of the railroad law, brought before a justice of the peace, it must appear either from the statement filed with him, or from his transcript of the proceedings, that the stock was killed in the township in which the suit was brought. If it does not so appear, the objection of want of jurisdiction may be raised for the first time in the Supreme Court. *Ib.*
3. TRANSPORTATION OF LIVE STOCK: CONNECTING ROADS: NEGLIGENCE. In an action against a railroad company to recover damages for negligence in the transportation of live stock, it appeared that the defendant company had undertaken to carry the stock to a point on a connecting road beyond its own line; that owing to the departure of the train on the connecting road before defendant's train arrived at the junction, they were detained there about twenty-four hours in severe winter weather, without food or water, in consequence of which they were greatly damaged; that they finally reached their destination without further delay; that the chief, if not the only injury sustained on the entire route was that caused by the detention, and that the stock was carried under a contract which exempted the defendant from liability for injuries occurring on con-



necting roads. Evidence having been admitted by the trial court, 1st, to show that when defendant's train was about to start plaintiff requested defendant's agent to telegraph to the agent of the connecting line that the stock was coming, but he failed to comply with the request, and that it was usual to give such notice, and on receipt of it the trains of the connecting company were accustomed to await the arrival of defendant's trains; 2nd, to show the condition of the stock when they arrived at their destination, their value in that condition, and what they would have been worth if sound; *Held*, that it was all properly admitted, the first as bearing upon the question of negligence; the second, as furnishing data from which the jury could arrive at the damage resulting from the detention, but not for the purpose of charging the defendant with any that might have occurred on the connecting road. *Dunn v. The Hannibal & St. Joseph Railroad Company*, 268.

4. TRANSPORTATION OF LIVE STOCK: CONNECTING ROAD. It is the duty of a railroad company receiving live stock for transportation to have proper machinery and facilities for unloading them whenever, in the course of the transit, it may become necessary to unload them for the purpose of feeding. *Ib.*
5. ———: ———. Where a railroad company undertook to transport live stock to a point beyond its own line, and on the line of a connecting company, and upon arrival of the train at the junction it was found that the stock could not be forwarded immediately, and that, to prevent damage, it should be unloaded, fed and watered; *Held*, that it became the duty of the first company to see that this was done; and that duty could not be imposed on the owner; and this, although he was accompanying the stock under a contract which provided that he should take care of, water and feed them while under transportation. *Ib.*
6. CONTRACT OF AFFREIGHTMENT: DAMAGES. A contract of affreightment contained this provision: "Claims for loss and damages must be presented in thirty days from date of shipment in order to receive attention." *Held*, that failure to present within thirty days did not cut off a claimant's cause of action. The language employed is too vague to be allowed that effect. Distinguishing *Rice v. Kansas Pacific R. R.*, 63 Mo. 314. *Ib.*
7. DAMAGES: EVIDENCE. In an action for damages against a railroad company for ejecting a passenger from a train at a station short of that for which she had procured a ticket, evidence offered by the defendant to prove a regulation of the company forbidding such train to stop at the station to which the ticket had been purchased, when such regulation was not set up in the answer, was properly rejected as not relevant under the issues made by the pleadings. *Hicks v. The Hannibal & St. Joseph Railroad Company*, 329.
8. PUNITIVE DAMAGES. Plaintiff testified that after the purchase of her ticket from Kansas City to Utica, she exhibited it to the baggage master who checked her baggage to Utica, and it was put upon the train by the agents of the company, who assisted her in getting into a car of the same train; that upon the arrival of the train at a station some miles short of Utica, upon her refusal to get off at that station as requested by the conductor, he used profane and threatening language to her, and thereupon sent a brakeman, who took her little girl,

thereby compelling her to follow with her baby, and leave the train at nine o'clock at night; that she was compelled to remain, in the dark and exposed to the cold, for half an hour until the freight train came along, and was made sick by the exposure; *Held*, that upon this evidence the trial court was justified in refusing an instruction asked by the defendant, that the plaintiff could not recover punitive, but only actual damages. *Ib.*

9. RAILROADS: COUNTIES IN WHICH SUITS AGAINST MAY BE BROUGHT. Under the statute, (1 Wag. Stat., § 28, p. 294,) suits may be brought against railroad companies in any county where such companies have or usually keep an office or agent for the transaction of their usual or customary business. *Ib.*
10. CONTRIBUTORY NEGLIGENCE: RAILROAD. A passenger who jumps from a railroad train in motion, not for the purpose of escaping some impending peril, but merely to avoid being carried past the station at which he intended to stop, is guilty of negligence, and, if he sustains injury, cannot recover for it. *Nelson v. The Atlantic & Pacific Railroad Company*, 593.

#### SEE COMMON CARRIER.

COUNTY BONDS, 1, 2, 3, 4.

DAMAGES, 1.

DEED, 3.

NEGLIGENCE, 1.

PRINCIPAL AND AGENT, 1.

RAILROAD, 18.

TAX, 3.

#### RAPE.

SEE CRIMINAL LAW, 3.

#### REASONABLE DOUBT.

SEE CRIMINAL LAW, 13.

#### RECEIPT.

THE term "receipt" used in an indictment imports a written instrument. *The State v. Bibb*, 286.

## RECEIVER.

1. **STATUTORY RECEIVER: AUTHORITY TO SUE.** A receiver appointed under Gen. Stat., chap. 199, secs. 52, 53, (Wag. Stat., p. 1048,) cannot maintain an action, in his own name, against the sureties on the bond of his predecessor.  
A receiver is not a trustee of an express trust. *The State ex rel. Fichtenkamm v. Gambs*, 289.
2. **CANNOT ENFORCE SURETY'S LIABILITY.** The liability of sureties on an official bond is not a "debt" which, under the 31st section of the attachment law, a receiver is authorized to sue for in his own name. *Ib.*
3. **WAG. Stat., secs. 52, 53, p. 1048,** relate only to receivers appointed "to keep and preserve money or other things deposited in court, or that may be the subject of a tender;" not to such as are appointed under the general equity powers of a court of chancery. The latter have no power to sue in their own names. Per HENRY, J. *Ib.*

## RELEASE.

SEE DEED, 4.

## REPLEVIN.

1. **REPLEVIN: FORM OF JUDGMENT FOR DEFENDANT.** In an action for the recovery of specific personal property, the plaintiff was put in possession under the writ, and, pending the suit, sold and disposed of the property. The cause coming on to be tried, the decision was in favor of the defendant, who, thereupon, waived his right to have the property returned to him, and elected to take judgment for its value in money, and the judgment was entered accordingly. Plaintiff complaining because the judgement did not order the return of the property or the payment of its value, in the alternative, as provided by Wag. Stat., sec. 12, p. 1026; *Held*, that the judgment was proper. Defendant had a right to make his election before the entry was made, especially in view of the fact that it was out of plaintiff's power to return the property. *White v. Graves*, 218.
2. **WIFE'S PROPERTY.** When a defendant in an action for the recovery of specific personal property claims the right to the possession as agent for his wife through a chattel mortgage in her favor and a sale thereunder, it is not necessary for him, in order to make good his defense, to show that the money secured by the mortgage was the separate property of his wife, or that the purchase at the sale under the mortgage was made to her use. *Ib.*

## RES ADJUDICATA.

PLAINTIFFS having, in the court below, filed a motion for an order to compel the sheriff to levy on certain moneys, the court refused the order. They then, on their own motion, became parties to a gar-

nishment proceeding, involving the same moneys, in which the judgment went against them. *Held*, in a suit on the bond of the sheriff for failing to make the levy that the rights of the parties were *res adjudicata*. *The State ex rel. The Kansas City National Bank v. Boothe*, 546.

SEE MALICIOUS PROSECUTION, 5.

## REVENUE.

SEE COUNTY BONDS, 1, 2, 3, 4.

## SALE.

1. **CONDITIONAL SALE: BONA FIDE PURCHASER WITHOUT NOTICE: LACHES: WAIVER.** A conditional vendor of personal property entitled by his contract to retake the property in case of condition broken, loses his right as against one who purchases from the conditional vendee *bona fide* and without notice of the condition, if he is guilty of laches in asserting his right, or if his conduct has been such as to waive performance of the condition. *Robbins v. Phillips*, 100.
2. **AGENT'S AUTHORITY TO RECEIVE PAYMENT.** An agent who sells by sample and on credit, and is not intrusted with the possession of the goods to be sold, has no implied authority to receive payment. *Rice v. Groffman*, 56 Mo. 434, distinguished. *Butler v. Dorman*, 298.

SEE FENCE-RAILS.

## SCHOOLS.

**SCHOOL FUNDS, WHO MAY SUE FOR.** An action on the bond of a defaulting county treasurer to recover school moneys, is properly brought by the county in the name of the State to the use of the county. The statute (Wag. Stat., § 42, p. 1251) does not require it to be brought to the use of the county clerk. *The State of Missouri to use of Saline County v. Sappington*, 454.

## SHERIFF.

SEE EXECUTION, 2, 3.

## SIGNIFICATION OF TERMS.

SEE ASSIGNMENT.

DEBT.

HEIRS.

RECEIPT.

RELEASE.

SPECIAL JUDGE.

SEE THE STATE V. SWEENEY, 96.

SPECIAL TAX BILL.

SEE MUNICIPAL CORPORATION, 2.

STATUTES.

SEE PLEADING, CRIMINAL, 4.

PRINCIPAL AND SURETY, 1.

STATUTES CONSTRUED.

## WAGNER'S STATUTES OF 1872.

Page 88, § 35, See Administration, 2.  
 Page 89, § 40, See Administration, 3.  
 Page 130, § 1, See Assignment, 1.  
 Page 187, § 31, See Receiver, 2.  
 Page 256, See Adoption.  
 Page 281, § 8, See Deeds of Trust and Mortgages, 2.  
 Page 294, § 28, See Jurisdiction, 1.  
 Page 414, § 1, See Husband and Wife, 2.  
 Page 445, § 1, See Murder, 9.  
 Page 450, § 33, See Assault.  
 Page 450, § 33, See Murder, 9.  
 Page 455, § 16, See Burglary, 1.  
 Page 456, § 24, See Criminal Law, 2.  
 Page 456, § 25, See Larceny, 2.  
 Page 454, § 31, See Embezzlement, 2, 3.  
 Page 459, § 37, See Larceny, 2.  
 Page 461, § 47, See False Pretenses.  
 Page 462, § 52, See Fraudulent Conveyances, 1.  
 Page 466, § 1, See Husband and Wife, 2.  
 Page 470, § 16, See Forgery.  
 Page 487, § 17, See Clerks of Courts.  
 Page 500, § 11, 12, 13, See Larceny, 3.  
 Page 516, § 36, See Criminal Law, 2.  
 Page 529, § 1, See Descent and Distribution, 1.  
 Page 549, § 2, See Dramshop, 2.  
 Page 573, § 54, See Election, 1.  
 Page 609, § 42, See Courts, 3.  
 Page 631, § 29, 31, See Clerks of Courts, 1.  
 Page 698, § 5, See Homestead, 6.  
 Page 698, § 6, See Homestead, 1, 2.  
 Page 770, § 25, See Insurance, 8.  
 Page 772, § 32, See Insurance, 1.  
 Page 957, § 4, See Partition, 2.

Page 971, § 31, See Partition, 2.  
 Page 1026, § 12, See Replevin, 1.  
 Page 1033, § 1, See Variance, 2.  
 Page 1048, § 52, 53, See Receiver, 1, 3.  
 Page 1193, § 165, See County Bonds, 3.  
 Page 1251, § 42, See County Treasurer, 1.

## GENERAL STATUTES OF 1865.

Page 449, See Homestead, 3.

## REVISED STATUTES OF 1855.

Page 829, § 34, See Administration, 1.  
 Page 829, § 34, See Limitation, 1.

## ACTS OF 1875.

Page 101, See Witness, 9.  
 Page 120, See Tax, 3.  
 Page 292, See Municipal Corporation, 4.

## ACTS OF 1874.

Page 46, See Dramshop, 2.  
 Page 74, See Insurance, 8.

## ACTS OF 1873.

Page 97, See Township, 1.

## ACTS OF 1865.

Page 86, See County Bonds, 2.

## ACTS OF 1853.

Page 392, §§ 6, 7, See Courts, 3.

## STREETS.

1. OPENING OF: DAMAGES: MODE OF COMPUTATION. In estimating the damages sustained by the condemnation of property by a city for the purposes of a street, where the whole lot has not been taken, the value of the land taken should be found, and then the increase or diminution in value of the remaining portion; or, the damages may be computed by ascertaining the difference between the value of the entire lot, with improvements, before, and the value of the premises remaining after, the condemnation *The City of Springfield v. Schnook*, 394.
2. ———: ———: EVIDENCE. What other persons have been allowed for their property in the opening or widening of a street, is not competent evidence of the amount of damage sustained by the defendant. *Ib.*
3. ———: ———: EVIDENCE. Where a short time prior to the institution of the proceedings for the widening of a street, the defendant agreed with the city to take a certain sum for a strip of land required for that purpose, and the agreement was not made by way of compromise, nor for the purpose of avoiding litigation; *Held*, that this agreement could properly be considered by the jury as evidence of the value which defendant, at that time, placed upon the strip, and an instruction of that purport asked by the city should have been given. *Ib.*
4. ———: DAMAGES—CONSEQUENTIAL. Consequential damages, in a proceeding to condemn land for the purpose of opening a street, should not be regarded. *Ib.*

SEE MUNICIPAL CORPORATION, 2.

## TAX.

1. DOWER NOT TO BE DIMINISHED BY TAXES. The amount allowed a widow for her dower out of the proceeds of the sale of the estate of her deceased husband, is not to be diminished by the taxes, or any portion of the taxes assessed against the land either in her husband's life-time or during her quarantine. *Graves v. Cochran*, 74.
2. ANNUAL ASSESSMENT IN ST. LOUIS. Under the charter of the city and the legislation of the State, annual assessments of real estate in the city of St. Louis are proper. *The State ex rel. Halpin v. Powers*, 320.
3. TAXATION OF RAILROAD PROPERTY. Under the act of 1875, providing for the assessment of railroad property and the collection of taxes thereon, (Acts 1875, p. 120,) railroad companies were liable to pay taxes for the year 1876, on their property owned August 1st, 1876, at the same rates as were levied on all other property in the State owned August 1st, 1876, for the year 1877. They could not be assessed at the rates imposed upon other property for taxes of 1876. *The State ex rel. Pettis County v. The Union Trust Company*, 463.

SEE COUNTY BONDS, 1, 2, 3, 4.



PERJURY, 1.

### TEMPORARY JUDGE.

SEE THE STATE V. SWEENEY, 96.

### THREATENING LETTER.

SEE CRIMINAL LAW, 2.

EVIDENCE, 2.

### TOWN PLAT.

SEE PRINCIPAL AND AGENT, 1.

### TOWNSHIP.

INDICTMENT FOR LARCENY OF TOWNSHIP PROPERTY. An indictment charged the defendant with stealing certain lumber, "the property of Blue Mound township, Livingston county." At the time of the alleged larceny, the township organization law (Acts 1873, p. 97) was in force, and authorized any county to adopt township organization upon a majority vote of the qualified voters. It provided that in counties adopting the law, each township, as a body corporate, should have power to purchase and hold such property, and so much thereof as might be necessary to the exercise of its corporate or administrative powers. In counties not so organized, townships had no such power. The indictment having been demurred to as insufficient, because Blue Mound township could not be the owner of the property; *Held*, that whether it could or not, depended on two facts, 1st, Whether Livingston county had adopted township organization; 2nd, Whether the property alleged to have been stolen was necessary to the exercise of the corporate powers of the township; and these could only be determined by a trial. Hence the demurrer should have been overruled.

*Seemle*, that no averment of these facts in the indictment was necessary. *The State v. Bench*, 78.

SEE RAILROAD, 2.

### TRE-PASS.

FENCE-RAILS, WHEN PART OF THE FREEHOLD: SALE: TRESPASS: TREBLE-DAMAGES. A person in possession of land under a contract of purchase, by the terms of which it is provided that a failure to pay at the time agreed upon shall work a complete forfeiture of his interest, has no right, after default made, to sell the fence-rails used to inclose the premises. The fence constitutes part of the freehold, and the fact that the rails may at the time be accidentally or temporarily detached from it, does not change their nature. A sale under

such circumstances carries no title, and if the purchaser removes them, he becomes liable as a trespasser, but not necessarily in treble-damages *Hannibal & St. Joseph Railroad Company v. Crawford*, 80.

TRUSTS.

1. TRUSTEE: ESTOPPEL. One who claims under a deed which was executed by a trustee, and which, by reference, recognizes a plat executed by a predecessor in the same trust, cannot deny that the latter had authority to act as trustee. *The Hannibal & St. Joseph Railroad Company v. Green*, 169.
2. TRUSTEE'S DEED: CONDITIONS TO EXERCISE OF POWER OF SALE. A conveyance by the trustee of a land company, who, by the terms of his trust, is required, before selling, to give a bond for the faithful performance of his duties, and to sell according to the rules to be prescribed by the company, carries the title to a stranger, although no bond has been given and no rules prescribed. *Ib.*
3. TRUSTEE'S DEED: WHEN IT CONVEYS THE TRUST ESTATE. Where a person, who was at the same time trustee of a land company with a power of sale, and also a member of the company, and as such beneficially interested in the land, executed a deed in which he described himself as trustee of the company, and the land as part of the town which his trust deed proposed should be laid off on the property of the company, and for a full description referred to a plat of the town then on file; *Held*, that this was sufficient to show that he was executing the deed as trustee, and was not merely conveying his beneficial interest. *Ib.*
4. TRUST DEED: NOMINAL CONSIDERATION: RAILROAD. It is no objection to a deed executed by the trustee of a land company, conveying a strip of ground for depot purposes to a railroad company which is building its road through a town laid out on the property of the land company, that the conveyance is made for the consideration of one dollar. *Ib.*
5. A receiver is not a trustee of an express trust. *The State ex rel. Fichtenkamm v. Gambs*, 289.
6. RESULTING TRUST. When a husband has entered land in his own name with money belonging to his wife's separate estate, because of a regulation of the land office, it is his duty, although he may be in embarrassed circumstances, to convey such land to a trustee for her benefit. *Payne v. Tryman*, 339.

SEE FRAUDULENT CONVEYANCE, 4.

INSURANCE. 5, 6.

VARIANCE.

1. An indictment charged the forgery of a receipt purporting to be the receipt of "Charles W. Jeffries;" the receipt set out *in hæc verba*, was signed "C. W. Jeffries;" *Held*, no variance. *The State v. Bibb*, 286.

2. The fact that a defendant was misled by a variance between the petition and the evidence, can only be shown by affidavit. 2 Wag. Stat., § 1, p. 1033. *Meyer v. Chambers*, 623.

## VENDOR'S LIEN.

1. EVIDENCE. The petition in a suit to enforce a vendor's lien misdescribed the estate vested in the vendee by the vendor's deed; *Held*, that this did not make the deed inadmissible in evidence, because the real question was whether the land was subject to the lien, and that did not depend on the character of the vendee's estate. *Davenport v. Murray*, 198.
2. HUSBAND AND WIFE: PAROL EVIDENCE. Taking the husband's name on the wife's note for the purchase money of land conveyed to the wife, does not waive the vendor's lien for the purchase money where the purchase was made by the husband and the land was conveyed to the wife at his request; and parol evidence is admissible to show that the purchase and conveyance were so made. *Ib.*
3. NECESSARY PARTY TO A SUIT TO ENFORCE. When the administrator of a vendor of real estate who has died without making a conveyance, brings suit for the purpose of enforcing a vendor's lien for the unpaid purchase money, the heirs of the vendor should be made parties, and their presence cannot be dispensed with by tendering, either in the pleadings or at the trial, a deed from the heirs to the vendee, unless the vendee accepts the deed. *Leeper v. Lyon*, 216.

## SEE PLEADING, 1.

## VERDICT.

1. INDICTMENT IN SEVERAL COUNTS: VERDICT. A verdict will not be disturbed because it does not specify the count under which the defendant was found guilty, when it is supported by one good count in the indictment. *The State v. Testerman*, 408.
2. IMPEACHMENT OF VERDICT. A juror will not be allowed to impeach his verdict by his affidavit that he would not have found the defendant guilty, if he had known that the punishment fixed by law for the crime charged was death. *The State v. Shock*, 552.

## SEE CRIMINAL LAW, 3,

## PRACTICE, CRIMINAL, 5.

## WAIVER.

## SEE CRIMINAL LAW, 5, 14.

## HOMESTEAD, 1.

## SALE, 1.

## VENDOR'S LIEN, 2.

## WHARF.

SEE MUNICIPAL CORPORATION, 1.

## WILL.

1. THE form of an instrument determines its character unless a contrary intention is apparent on its face. *Miller v. Holt*, 584.
2. INSTRUMENT CONSTRUED TO BE A WILL. One A executed an instrument which purported to be his will, but which was under seal, and which, among other things, contained this clause: "Know all men that I do hereby, on and after the day of my death by this will, grant, convey and assign to N. McD. A., his heirs and assigns, the following described tract of land." N. McD. A. was his son, and had, on the same day, "in consideration of a certain will," entered into an agreement to support his father during his natural life. The instrument was never delivered; *Held*, that it must be regarded as a will and not as a deed. *Ib.*

SEE DEVISE, 1, 2.

## WITNESS.

1. WITNESS, OTHER PARTY DEAD. The fact that the grantor is dead does not make the grantee incompetent to testify in relation to the execution of a deed, when the question arises in a suit between the grantee and a stranger to the deed. *Bradley v. West*, 69.
2. ACCUSED TESTIFYING FOR HIMSELF. When the defendant in a criminal case testifies in his own behalf, he stands on the same footing as any other witness, and is subject to the same rules and tests, (following *The State v. Clinton*, 67 Mo. 380). *The State v. Rugan*, 214.
3. IMPEACHMENT. Where defendants attempted to impeach plaintiff's witness by proving he had said, that if plaintiff recovered in the suit there would be money in it for him; *Held*, that there was no error in allowing plaintiff to be recalled, and to state that he had never, directly or indirectly, offered witness any money or reward; that such testimony could not prejudice defendants, as it tended to show that witness' statement was false, and was, therefore, in aid of defendants' object, the impeachment of the witness. *Lemon v. Chanslor*, 340.
4. ACCUSED TESTIFYING FOR HIMSELF. The defendant in a criminal case, when he testifies in his own behalf, occupies the position of any other witness, and subjects himself to just as searching a cross-examination; and the prosecuting attorney has the same right to comment upon his testimony as that of any other witness. *The State v. Testerman*, 408.
5. OTHER PARTY DEAD. In a suit against the makers of a promissory note prosecuted by the administrator of the deceased payee, a de

fendant is not a competent witness on behalf of one of his co-defendants to prove failure of consideration. *Hissaw v. Sigler*, 449.

6. DISQUALIFICATION OF CONVICT AS WITNESS. A person who has been convicted of obtaining money under false pretenses, and has been sentenced to the penitentiary, is not a competent witness; and the fact that his sentence has been suspended by an appeal and order of supersedeas does not remove or suspend the disqualification. *Ritter v. The Democratic Press Company*, 458.
7. DEATH OF ONE OF TWO ADVERSE PARTIES. Where the contract sued on was made on the one side by two persons, one of whom has since died, that fact does not disqualify the adverse party from testifying in the case. *Fulkerson v. Thornton*, 468.
8. ACCUSED TESTIFYING FOR HIMSELF. A defendant testifying in his own behalf, in a criminal case, has as much credibility attached to his testimony as if testifying in a similar manner in a civil case. *The State v. Thomas and Allen Swain*, 605.
9. ABSENT WITNESS: IMPEACHING EVIDENCE: CONTINUANCE. Where, in order to avoid a continuance, the prosecuting attorney, under the act of 1875, (Sess. Acts 1875, p. 104,) consents that the defendant may read to the jury a statement of what an absent witness would swear to if present, as his testimony, the State may, by way of impeachment, give evidence to show that such witness has made a contrary statement; but the jury should be instructed, in explicit terms, that such evidence is received only for the purpose of destroying the effect of the absent witness' testimony, and not as evidence of defendant's guilt. *Id.*

SEE PRACTICE, CRIMINAL. 4.

## ERRATA.

Page 422, line 15, "of that" should read *with that*.

Page 425, line 21, "execution a" should read *execution of a*.

Page 425, line 24, "Briyht" should read *Bright*.

Page 425, line 28, "Houp" should read *Houx*.

Page 428, line 36, "Glasscock" should read *Glascock*.

Page 429, line 18, "Glasscock" should read *Glascock*.

Page 431, line 9, "Dandrige" should read *Dandridge*.

Page 432, line 19, "Dandrige" should read *Dandridge*.

Page 433, line 12, "discovered" should read *was discovered*.

Page 433, line 35, "Beazly" should read *Beazley*.

Page 435, line 3, "then" should read *there*.

Page 435, line 21, "shall be void. An" should read *shall be void, an*.

Page 436, line 35, "Borchart" should read *Borchert*.

Page 438, line 9, "Burrell" should read *Burrill*.

Page 438, line 14, "provisions" should read *provision*.

Page 439, line 31, "Labaume" should read *Labeaume*.

Page 448, line 23, "would" should read *could*.

Page 474, line 17, "480" should read *484*.

Page 475, line 28, "Morgan" should read *Moran*.

Page 476, line 17, "Prime" should read *Primm*.

Page 476, line 18, "Mockler" should read *Mockbee*.

Page 476, line 37, "Todd v. Cousins" should read *Ladd v. Couzins*.

Page 477, line 21, "Hardier" should read *Hardin*.

Page 486, line 26, "Gaskill v. Gaskill, 186," should read *Gaskell v. Gaskell, 643*.



ERRATA



Page 489, line 3, "17 Ves. —" should read 17 Ves. 255.

Page 489, line 5, "C. E. Green —" should read C. E. Green 90.

Page 542, line 6, "607" should read 651.

Page 547, line 1, "Wigman, 126," should read Wegman, 176.

Page 547, line 1, "Ahle" should read Achle.

Page 549, line 36, "Fendale, 44," should read Fendall, 116.

Page 550, line 9, "Dauson v. Halcomb, 275," should read Dawson v. Holcomb, 135.

Page 551, line 11, "Tindall" should read Fendall.

Page 554, line 21, "65" should read 66.

